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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-746

CHARLES N. BUCHHOLTZ and LESTER J. TAUER, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

SWIFT & COMPANY and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

SWIFT & COMPANY and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit reversing judgment granted by the district court, District of Minnesota, to petitioners.

OPINIONS BELOW

The revised panel opinion of the Court of Appeals (App., pp. A-5 - A-23) is unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (87 Lab.

Cas.) ¶11,542. The Order of the Court of Appeals denying rehearing en banc (App., pp. A-26 - A-27), a dissent from the denial of rehearing en banc by Judge Lay, joined in by Judge McMillan (App., pp. A-27 - A-42), and a concurring statement in the denial of rehearing en banc by Judge Heaney, joined in by Judge Bright, (App. pp. A-42 - A-43), are unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (87 Lab. Cas.) ¶11,543. The original panel opinion (App., pp. A-44 - A-60) is unofficially reported as *Buchholtz v. Swift & Co.*, 5 Lab. L. Rep. (CCH) (86 Lab. Cas.) ¶11,313.

The Findings of Fact, Conclusions of Law and Order for Judgment of the district court (App., pp. A-61 - A-120) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App., pp. A-24 - A-25) was entered on September 7, 1979. The court of appeals' original panel opinion was filed on April 25, 1979. A timely motion for rehearing and suggestion that rehearing be held en banc was filed by petitioners. The Order of the Court of Appeals denying rehearing en banc was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a union withdraws employees' contract grievance from arbitration and appropriates settlement proceeds to the use of others may employees recover damages for unfair representation from the union only if they prevail against the company on the contract claim?

2. Whether a union breaches its duty of fair representation to its former members when it trades their grievance claim for wages in return for an equivalent amount of gratuitous pension benefits for present members?

3. Whether employers may close a plant and terminate employees who have satisfied credited service requirements for vacation pay and deny such pay by timing the closing to avoid what is claimed to be an eligibility date?

4. Whether review of a contract claim is properly treated as an issue of pure law where the district court, acting as substitute for arbitration, makes findings of fact that resolve the claim with reference to traditional arbitral practice and authority?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, reproduced in the Appendix at pp. A-1 - A-5, are:

Labor-Management Relations Act § 301 (29 U.S.C. § 185)

National Labor Relations Act §§ 7, 8(b)(1), (2), and 9(a) (29 U.S.C. §§ 157, 158(b)(1), (2), and 159(a))
28 U.S.C. § 1337.

STATEMENT OF CASE

This class suit was commenced by petitioners in November 1971 against Swift & Co. (hereinafter Swift or Company) and The Amalgamated Meat Cutters and Butcher Workmen of North America[1] (hereinafter Amal-

[1]Amalgamated, on June 6, 1979, merged with the Retail Clerks International Union. The successor union is the United Food and Commercial Workers International Union (UFCW), the largest union within the AFL-CIO with approximately 1,200,000 members and locals in every state.

gamated or the Union). The jurisdiction of the district court was invoked under 29 U.S.C. § 185, and under 29 U.S.C. §§ 157, 158, 159 and 28 U.S.C. § 1337. The suit arises out of the closing by Swift of one of its largest and oldest plants, in two phases. The first phase occurred on November 29, 1969, and resulted in the termination of some 1,500 hourly employees, more than 1,000 of whom comprise petitioner class. Several small departments were continued, employing 200-250 hourly workers. Amalgamated represented all the above employees, who were also members of its Local Union P-167 and a parallel private club, Club 167. When petitioners were discharged in 1969, their Union membership ended, and local P-167 thereafter consisted of the remaining 200-250 employees. Most petitioners did continue their membership in the private club and a running dispute developed between Amalgamated and petitioners over this fact and other matters relating to the club.

Under the labor agreement between Swift and Amalgamated, annual vacations were earned and distributed, year-to-year, on the basis of a "vacation year" running from December 28 to the subsequent December 27. The vacation provisions (App., pp. A-64 - A-65) provide that "Vacation eligibility requirements are based on credited service." The various formulas for calculating credited service as of December 28 contain a proviso that the employee be on the active payroll on that date. When petitioners were terminated on November 29, most of them had earned sufficient credited service since the last December to be eligible on that basis for a full vacation, but Swift's timing made it impossible for them to be on the active payroll twenty-nine days later on December 28, or

thereafter. Swift purposely moved its closing arrangements along to ensure that this impossibility would exist (App. p. A-69). (II R 747, 748, 750; V R 2340, 2341)[2] and refused to pay vacations demanded by the Union on the ground that petitioners would not be on the payroll on December 28.

The local union filed a grievance. Petitioners were knowledgeable of a similar closing on December 21, a year earlier, in Sioux City, Iowa, and that Amalgamated had in that case reached a settlement with Swift in which vacations were paid the employees. Amalgamated advised petitioners not to use the leverage employed by the Sioux City employees—threatened transfers to nearby plants so as to be on the payroll on the one day—assuring petitioners that their case would be arbitrated.[3] (III R 968, 969, 1154-56). Amalgamated official Charles Fischer told petitioners that he thought they had a "good" grievance, and that the Union had won a similar case against another meat packer, Wilson & Co. (IV R 1844-45, 1864).

The grievance moved slowly from readiness for the fourth step (December 1969) to the fifth step, arbitration, scheduled for April 28, 1971—a Wednesday. As a result of an injury sustained by Company representative Tagg on Sunday, April 25, the arbitration of petitioners' grievance, one of four scheduled for arbitration, was postponed until June 23, 1971. Petitioners' grievance had a potential value of $1,053,688 (VI R 2975).

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[2]The record in the court of appeals consisted of volumes numbered I through VI and will be referenced herein in this fashion. References to the separately printed Appendix to this petition will be as "App."

[3]Amalgamated's president in a letter to class petitioner Tauer of January 29, 1971, assured petitioners that the vacation pay grievance would be arbitrated. (V R 2378).

The Settlement or "Swap"

The "swap" of petitioners' grievance, foreclosing arbitration, is at the heart of this case. The facts are not disputed. On May 29, 1971, one month after postponement of the scheduled arbitration, Swift announced that it would close the remainder of the plant and terminate the remaining employees who comprised the Local Union. Within days, a meeting was arranged in Chicago between Swift, Amalgamated and local representatives to discuss "settlement" of four grievances, including petitioners' vacation pay grievance. The meeting occurred on June 7, 1971. Local Union representatives wanted to obtain special "pension-type" benefits for remaining employees and Union members who would be less than 55 upon their termination. It was never contended by anyone that there was even a colorable claim to such benefits under the labor agreement, and Amalgamated conceded that such benefits were extra-contractual. (III R 1340-41).

At this first meeting the Union withheld the vacation grievance and received an offer of $8,000 cash to settle the three other grievances. (III R 1218-19). Union official Fischer advised the local officers that unless petitioners' grievance was included, they would not be in a good position to gain pension-type and hospitalization benefits for their group. (III R 1344-46. At a second meeting, on June 18, 1971, five days before its scheduled arbitration, Amalgamated offered petitioners' grievance together with the other three; Fischer said it was then that "heavy bargaining" began, culminating in the settlement agreement. (III R 1346-47). Petitioners' grievance was withdrawn

"with prejudice," but "without precedent"[4] concerning its underlying merits. (VI R 2472-78). In return Swift agreed to provide special pension-type benefits and hospitalization coverage to sixty-seven Local Union members, including three who participated in the negotiations. The value of these benefits was $928,000. (IV R 1702-06).

The "swap" was ratified by a vote of the then Local Union's membership, including the beneficiaries. Petitioners, whose Union membership had ended eighteen months before, were not consulted or permitted to participate. Petitioners sought to protest the use of their grievance as bargaining material. Local Union President Sylvester said he

> [Told Mr. Buchholtz that I did not want him telling the Local what to do about the grievance because I considered it the property of the Local Union]. . . . And I told our people that this was a Local Union grievance, that we would have to handle it, we would have to push it, settle it. Whatever we did with it would be a Local Union thing to do with it. *People from outside* shouldn't be telling us what to do, or how to handle it. . . . [I told] Mr. Buchholtz and others, in substance, not to tell [me] what to do because it was the Union's grievance, it was the *property* of the Union.

(III R 1408) (Emphasis added).

Proceedings Below

In petitioners' suit for contract damages and for damages flowing from the Union's alleged unfair representation, liability and damages issues were bifurcated for trial.

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[4]The South St. Paul closing was one of many plant and department closings that Swift had effected or scheduled as a part of a long range plan.

After an eight-day trial the district court found in favor of petitioners against both defendants. With respect to Amalgamated's conduct, the district court found that it had processed petitioners' meritorious grievance in a perfunctory fashion; that it had acted in bad faith and settled the grievance, not because it believed it lacked merit, but because it had settlement value based on merit; that the settlement by which sixty-seven Union members with no claim reaped the settlement value of a grievance for earned wages filed for over 1,000 former Union members was arbitrary and, indeed, reflected a failure of the Union to represent petitioners at all; and that the settlement was the product of discrimination against petitioners because of their nonmembership in the Union and was motivated by a hostile animus toward petitioner by Amalgamated, borne of dispute between the latter and Club 167. (App. pp. A-82 - A-100).

On the issue of liability for vacation pay, the district court ruled in favor of a majority of petitioners' class on three separate bases. First, the court reasoned that presence on the payroll on one day was no part of the service by which vacation pay was earned, and was designed to perform administrative purposes relevant in an ongoing plant, but not to a close-down situation. Second, the court reasoned that the employer could not unilaterally render a condition impossible to meet and then assert failure of that condition as justification for nonpayment of wages earned by service already performed. Third, the court found that Swift, by deliberately timing the closing after credited service would be earned by almost all employees, but before December 28, had violated paragraph 10 of

the labor agreement, which provided that the Company would not use reserved powers to "avoid any other provision of this Agreement." (App., pp. A-67 - A-73.)

The district court made detailed findings (App., pp. A-72 - A-73) concerning the parties' bargaining history and past practices. Those findings are described in part in the Dissenting Statement of Judges Lay and McMillian. (App. A-31 - A-32). The court considered a number of arbitration and judicial authorities awarding vacations in similar circumstances. These included the Sixth Circuit's opinion in *Local 186, United Packinghouse Food & Allied Workers v. Armour & Co.*, 446 F.2d 610 (1971), *cert. denied*, 405 U.S. 955 (1972), and the *Wilson Co.* arbitration case. (App., pp. A-121 - A-129) (unpublished opinion). Both cases involved identical issues, the same industry and the same Union as the present case.[5]

Damages and subclass issues were determined in 1977-78, and on July 8, 1978, $574,349 in vacation pay and $34,460 in prejudgment interest were awarded to a majority of petitioner class as against Swift. As against Amalgamated the court awarded $224,515 in prejudgment interest on the vacation claims, and $287,004 in attorneys' fees was awarded all of petitioner class, as damages, for unfair representation.

On appeal a panel of the Eighth Circuit in its original opinion characterized the whole case as a § 301 action, "reached a different conclusion" on the contract claim, and directed dismissal of petitioners' case against both respondents. (App., pp. A-45; A-51; A-60). It did not address "substantial issues" of unfair representation because it

[5]The United Packinghouse Workers represented Swift's employees. It merged with Amalgamated in 1968.

held that to recover against the Union the petitioners had to show a breach of contract by the Company. This conclusion was based solely on language from *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976): "To prevail against either the company or the union, petitioner must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the Union." (App., p. A-51) (Emphasis by court below).

On denial of petitioners' Petition for Rehearing En Banc, the panel revised its opinion by adding a brief analysis of the Union's liability. It said: "[W]e hold that because there was no contractual obligation on the part of Swift to pay the vacation pay, that under the circumstances of this case and considering the duty of the union to fairly represent the older employees too, the union could not be held guilty of unfair representation." (App., p. A-21 - A-22). Again, the language from *Hines*, with added emphasis to the element of contract breach by the employer, was the sole citation. "Alternatively" the court ruled that even if petitioners' grievance might have been won at arbitration, where the Union "is also pressing claims for other employees which are arguably meritorious," and no clear showing of bad faith is made, it cannot be said the Union unfairly represented petitioners. (App., p. A-22). The court rejected the district court's factual finding of bad faith, saying that the "cornerstone" of its finding was its conclusion on the contract merits, and that they disagreed with that conclusion "as a matter of law." (App. p. A-23). The circuit court concluded that the Union "used its best judgment to obtain the maximum benefit for the largest number of its membership." (App., p. A-23).

In a brief Concurring Statement upon Denial of Petition for Rehearing En Banc, Judges Heaney and Bright disagreed with the panel on the merits of the contract claim, but they agreed with the panel's alternate holding, which legitimized the Union's settlement of petitioners' grievance (i.e., the "swap").

A Dissenting Statement upon Denial of Petition for Rehearing En Banc was filed by Judge Lay and joined by Judge McMillian. These judges strongly disagreed with the panel on both the contract and the unfair representation claims of petitioners, and they outlined four "compelling reasons" for the court to reconsider en banc the panel's decision. The Dissenting Statement contains an analysis of petitioners' claims, notes that the unfair representation claim has a basis in federal jurisdiction independent of LMRA § 301, and relates the fact-finding of the district court in some detail, particularly as it bears on the nature of the "swap," the basis for its finding of bad faith, and the factual underpinning of its ruling on the contract merits. With respect to the "swap," the dissenting judges twice point out that the benefits received by Union members from the trade-off of petitioners' grievance were conceded by the union to be "extra-contractual."

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Decision on the Unfair Representation Claim Is in Direct Conflict with the Decisions of This Court and the Decisions of Other United States Courts of Appeal

On facts that are undisputed, the court of appeals legitimized the Union's use of a $1,053,000 claim of former

union members for earned wages to buy $920,000 worth of extra-contractual benefits for its then members. The court justified its result by its reading of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and, in rationalizing the result, the court rendered the "arbitrary" conduct standard of unfair representation meaningless and reasoned backwards from its conclusion on the merits of petitioners' contract claim to a characterization of the Union's conduct eight years earlier, all in direct conflict with *Vaca v. Sipes*, 386 U.S. 171 (1967). The judicial review afforded in this case departs from the traditional modes of review of a district court's proceedings.

In its original opinion, the court of appeals reversed petitioners' judgment against Swift, and then, relying exclusively on language from *Hines*, ruled that if petitioners could not recover against Swift, they could not recover against Amalgamated. The quoted language from *Hines* was:

> To prevail against either the company or the union, petitioners must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the union.

(App., p. A-51) (Emphasis in original). In its revised opinion, the Court of Appeals added a brief analysis of the Union's liability and duty, and concluded that the Union could not have breached its duty. Again, sole reliance for authority was placed on the same language, with the same emphasis, from *Hines*. In both opinions, the court stated that jurisdiction of petitioners' claim against Amalgamated was based on LMRA § 301, though petitioners pleaded a jurisdictional basis for their separate cause of action against the union in 28 U.S.C. § 1337.

Petitioners will show below that the appellate court's ultimate conclusion on the contract claim in this case controlled its disposition of petitioners' case against Amalgamated. But first, petitioners address the meaning of this Court's language in the *Hines* case, language that petitioners contend led the court of appeals to a fundamentally important misconception of both the nature of a union's duty of fair representation, and the nature of a cause of action for breach of duty.

In *Hines*, this Court limited its view to a single question of whether or not employees could claim under LMRA § 301 for *wrongful discharge* even though they had lost in *arbitration*, if they could show inadequate representation during arbitration by their union. 424 U.S. at 561, n. 7. The claim under § 301 was a contract claim. The Court was answering an assertion that any recovery would undermine the finality of arbitration, which had determined the contract issue of discharge. In that type of case, to warrant disturbing the result of arbitration, it would have to be shown that the union's alleged failures were prejudicial. But even more clearly, to recover against the union for *wrongful discharge*, the employees would have to show wrongful discharge, and any such recovery would be an apportionment of damages between the union and the company on the contract claim.

Petitioners do not believe that this Court intended in *Hines* to reverse its thirty-five year long recognition of a federal cause of action for unfair representation. *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In the context of grievance administration, several

courts of appeal have recognized that if an employee is injured by his union's unfair representation, recovery may be had even though the employee could not recover on an underlying contract claim against the employer.[6] It is one of the firmest traditions of American law, going back at least to the decision of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), that where there is injury from the violation of a right, there should be a remedy. Where employees prove unfair representation, the only remaining question should be whether they suffered injury from the union's wrong. If petitioners are not entitled to vacation pay from Swift in their § 301 action, they are not entitled to interest, as such, from Amalgamated on unpaid vacation pay, as an apportionment of damages in their § 301 action. *Vaca v. Sipes,* 386 U.S. 171 (1967). That is hardly to say, however, that they were not injured by their union's wrongful appropriation of the settlement value of their vacation claim, which forced them from the forum of cost-free and relatively simple and prompt arbitration to the full gamut of a federal trial, with its attendant costs, where they faced an alignment and the combined resources of their former union and employer.

The district court awarded, as damages, the attorneys' fees and costs incurred in the litigation of petitioners' contact claim. As the Sixth Circuit said in *Scott v. Local 377, International Brotherhood of Teamsters,* 548 F.2d 1244, 1246, *cert. denied,* 431 U.S. 968 (1977):

[6]*See, e.g.*, Kaiser v. Local 83, International Bhd. of Teamsters, 577 F.2d 642 (9th Cir. 1978); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978); Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975); Mumford v. Glover, 503 F.2d 872 (5th Cir. 1974).

> A different situation is presented, however, in his action against the Union, for in that action the principal element of Scott's damages is the amount which it cost him in attorney fees and other expenses to do that which the Union was obliged but failed to do on his behalf.

That the court of appeals ultimately resolved petitioners' contract claim against them did not diminish their right, under *Vaca* to have it resolved.

Furthermore, the Dissenting Statement observes (App., p. A-41 - A-42):

> Here there is no problem measuring damages. The record is clear that, until it agreed to "throw-in" plaintiffs' vacation pay grievances, Swift had made a cash offer of only $8,000 to settle the grievances. When the vacation pay grievances were included in the settlement negotiations, the grievances were settled, Swift agreeing to provide benefits to the remaining members of the union which it valued at $928,200. Thus even assuming the plaintiffs were not entitled by virtue of the collective bargaining agreement to vacation pay, they were entitled to the value of the grievances relating thereto, which the union arbitrarily and in bad faith traded for pension and other financial benefits for the remaining members of the union. On these facts one need not be clairvoyant to determine the damages plaintiffs are entitled to recover due to the union's breach of its duty of fair representation.

In any other context, this type of trade would not be tolerated. Assume the situation where an injured plaintiff has a claim where liability is disputed. It seems not to require explanation that a lawyer could not settle that

claim and turn the benefits of the bargain over to some third person who had no claim of any kind. The argument that the injured plaintiff had not been damaged because his case, if tried, would have been lost, is clearly invalid. Regardless of the ultimate determination on the merits, the claim had value at the time of the settlement and the injured person is entitled to that value. Similarly in this case, the vacation pay grievance was traded because at the time of the trade it had value (almost $1,000,000 as measured by the consideration for the dismissal) and that value cannot fairly be given to the present union members who had no claim for payments or benefits of any kind.

While this Court has just ruled, 5-4, in *International Brotherhood of Electrical Workers v. Foust*, — U.S. —, 99 S. Ct, 2121 (1979), that punitive damages may not be recovered in an unfair representation suit, all the Justices would seem to agree that "the fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights" and that "relief in each case should be fashioned to make the injured employee whole." — U.S. at —, 99 S. Ct. at 2126.[7]

The controlling influence of *Hines* in the revised opinion of the court of appeals is made explicit in the one state-

[7]Petitioners pursued theories of restitution and unjust enrichment in the district court. When the district judge awarded the cost of pursuing their claim to all petitioners and vacation pay plus delay damages in the form of interest, apportioned to the defendants, to those petitioners whose vacation pay claims were upheld, the underpinning for further pursuit of *compensatory* remedies was essentially removed. Counsel for petitioners did file a cross appeal on behalf of those members of petitioner class denied vacation pay and interest by the district court. In their timely Petition for Rehearing En Banc, petitioners renewed their claim that if the court would not permit recovery of vacation pay, petitioners were entitled to the settlement value of their vacation pay grievance whether or not the theory was one of restitution or one of damages.

ment of the court's holding where it speaks to the Union's "liability" and isolates the lack of a contractual obligation on the part of Swift as the controlling factor, citing *Hines*. In an "alternative" holding the court concludes that the Union did not violate its duty of fair representation, but the quality of review and what the court said and left unsaid in this branch of its opinion are difficult to explain on any other grounds than that the court felt compelled by a belief that the Union could not be *liable*, in the absence of contract breach, to conclude that the Union could not be *guilty* of unfair representation.

Application of the alternative holding is dependent on the absence of bad faith by the Union. The trial court found as fact that the Union acted in bad faith. But the court of appeals rejected this finding solely on the basis of its disagreement with the district judge, as a "matter of law," on the merits of the contract issue, saying that this issue was the "cornerstone" of the trial court's finding. A cursory examination of the findings of fact will show that the district judge based his finding on the totality of circumstances, of which the most important were the nature and circumstances of the settlement or "swap." But demonstrating beyond cavil that the district judge did not draw his factual finding of bad faith from his conclusion on the merits of the contract claim is the fact that he found that the Union acted unfairly and in bad faith towards *all* of petitioner class, while finding in favor only of *some* of petitioner class with respect to the claim against Swift. The Dissenting Statement analyzes the issue of bad faith at some length and concludes: "The panel decision fails to recognize the evidence from which a learned and experienced district judge found bad faith of the union."

The court of appeals did not address at all the separate findings of fact by the district court: That the Union discriminated against the petitioners because of their non-membership in the Union, and in favor of the settlement beneficiaries because of their membership; that the Union was motivated by a hostile animus towards petitioners; and that the Union was motivated not by an assessment that petitioners' grievance had settlement value grounded in its merits, but by its assessment that the grievance had settlement value grounded in its merit.

The substance of the alternative holding of the court of appeals was that the Union's conduct was not arbitrary because the Union's withdrawal of petitioners' grievance resolved conflict between their grievance and the "rights of the older employees" who had claims that were "arguably meritorious." In this connection it is imperative that one not lose sight of what happened when petitioners' grievance was traded away. The historical facts of the "swap" are not disputed and are correctly described in the Dissenting Statement. The above characterizations by the court of appeals are not only utterly devoid of factual support in the record, they contradict the record. *See Thompson v. City of Louisville*, 362 U.S. 199 (1960). The Dissenting Statement twice points out what petitioners have stressed throughout: The union *conceded* that the beneficiaries of the settlement sought and received special benefits that had no foundation whatever in the labor agreement. The total foundation for their "claims" was their desire for unique benefits. Nor has it ever been suggested prior to review below that this case somehow involved conflict between older and younger employees. A

sub-class of the petitioner class had with it more employees who in 1969 were older than the settlement beneficiaries were in 197'. It was the relative youth of the beneficiaries that led them to seek pension-type benefits that were not provided by the labor agreement. Members of petitioner class who were of equal age when they terminated received no such benefits. Conflict was real; but it was conflict between Union members, who wanted very costly benefits that could be obtained only by exercising control over petitioners' grievance, and petitioners, who as former Union members—"outsiders"— could exercise no control over the disposition of their grievance.

The Dissenting Statement says of the court's analyses:

> The panel decision, which gives only perfunctory attention to the unfair representation claim apart from the contract discussion, reflects either abandonment of the court's "traditional supervisory jurisdiction," [Citing *Vaca v. Sipes*, 386 U.S. 171, 182] or a fundamental misconception of the nature of unfair representation suits.

The court of appeals did not cite any case or explain any factor or need peculiar to labor-management relations that would explain the legitimation of conduct that surely would be condemned in all other walks of life. *Vaca* permitted unions to control grievance and arbitration procedures, subject to a duty of fairness, for reasons solidly grounded in the labor-management relation and in conditions necessary to the viability of arbitration as a preferred federal forum for the resolution of disputes. The

arbitration process between Swift and Amalgamated has seldom been used and thus was hardly overburdened.[8] In any event, petitioners did not present a situation in which hundreds of small separate claims pressed for attention. Arbitration of their grievance was scheduled to take a maximum of two days and would have resolved the common claim of more than 1,000 employees.

Mr. Justice White said in *Humphrey v. Moore,* 375 U. S. 335, 350 (1964), that "conflict between employees represented by the same union is a recurring fact." He also said in *Vaca v. Sipes,* 386 U.S. at 193, that the duty of fair representation "protects the individual employee from arbitrary abuses of the settlement device." The resolution of true conflict, as in *Humphrey v. Moore,* where a seniority dispute was involved, and the temptation to engage in "horsetrading" may be among the most common problems faced by unions in their administration of collective bargaining agreements. Because the problems are so important and recur so frequently,[9] guidance is needed. So

[8]Swift pointed out in its brief below at p. 45 that only four grievances were arbitrated between the parties during the years 1970-1975. *See also* Vaca v. Sipes, 386 U.S. at 192 n. 15, indicating that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration.

[9]The problem of "horsetrading" has been isolated and commented on by the leading authors in the field of labor law. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?,* 1260 Pa. L. Rev. 251 (1977) (grievance horsetrading is "rankest form of arbitrary and discriminatory conduct"); Summers, *Individual Rights In Collective Agreements & Arbitration,* 37 N.Y.U. L. Rev. 362 (1962) (danger of unfairness to the individual in grievance handling by the union can be substantial; "horsetrading in grievances can become common-place); *see* Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601 (1956) (giving exclusive control of grievance procedure to bargaining representative entails risk to employee as "the temptation [to the union] to engage in 'horsetrading' is not inconsiderable."); Cox, *The Duty of Fair Representation,* 2 Vill. L. Rev. 151 (1957) (in judging whether settlement of one party's grievance for benefits to another party is "unfair" one should take into account evidence of discrimination or arbitrary "horsetrading").

far, where trade-offs have been permitted by the courts of appeal, the facts have borne little resemblance to the present case, and some values peculiar to the labor-management relation have been present. Nevertheless, the courts have warned that "sheer favoritism" will not be permitted, *Simberlund v. Long Island R.R.,* 421 F.2d 1219, 1227 (2d Cir. 1970); that "the deliberate sacrifice of a particular employee as consideration for other objectives must be a concession the union cannot make," *Local 13, International Longshoremen's Union v. Pacific Maritime Ass'n,* 441 F.2d 1061, 1068 (9th Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972); and that a union may not discriminate against those it represents on the basis of their political power or lack thereof within the union. *Truck Drivers & Helpers, Local 568 v. NLRB,* 379 F.2d 137 (D.C. Cir. 1967); *Gainey v. Brotherhood of Railway & Steamship Clerks,* 313 F.2d 318 (3d Cir. 1963); *Ferro v. Railway Express Agency, Inc.,* 296 F.2d 847 (2d Cir. 1961).

The Decision of the Court of Appeals on the Merits of the Contract Claim Is in Direct Conflict with the Decisions of The United States Court of Appeals for the Sixth Circuit

The district judge resolved petitioners' contract claim, sitting as a substitute for arbitration, and based his decision on a series of fact findings in addition to contract language analysis. The court of appeals approached the merits purely as a "matter of law," made a fully independent appraisal, including its own fact finding, and reversed the district court without deference to its conclusions. In doing so, the court ignored arbitral and judicial cases in the same industry, raising the same issues, and involving

the same union as in the present case. The court acknowledged conflict between its decision and several cases from the Sixth Circuit, saying "We choose not to follow that line of authority."

On denial of a petition for rehearing en banc, four additional judges on the Eighth Circuit stated an opinion on the merits of petitioners' claim against Swift. All four disagreed on this issue with the two circuit judges who participated in the panel's decision. The Dissenting Statement summarizes some of the district court's fact-finding and reasoning on the merits of the contract claim, and observes that "the panel decision is contrary to existing federal law and basic contract principles governing collective bargaining agreements."

The labor agreement provided that "vacation eligibility requirements are based on credited service," and most of petitioner class had earned credited service for a full vacation in 1970 by work performed in 1969. The district court found that Swift timed the closing of the plant to prevent petitioner class from being on the payroll on December 28. (App., p. A-69). Swift denied vacation payment for that reason, claiming that presence on the payroll on the one day was an additional condition of eligibility. The question on the merits was whether in these circumstances Swift could cause vacations earned as part of the annual wage package to be forfeited. This question has arisen numerous times in the past. One of the principal cases in the Sixth Circuit, *Local 186, United Packinghouse Food & Allied Workers v. Armour & Co.*, 446 F.2d 610 (1971), *cert. denied*, 405 U.S. 955 (1972), raised the same basic issue in the same industry and involved a local of the same union involved in this case, as the predecessor

of Amalgamated. Armour made the same type of argument as Swift, particularly including an argument that never in previous plant closings had it paid vacation pay to any employee unless the employee was employed on January 1. In *Armour* the union was seeking vacations. The case was pending before the Sixth Circuit when Amalgamated traded away petitioners' grievance in the present case. Vacations were awarded and the Sixth Circuit noted the approach taken in labor arbitration: "*When situations such as this have arisen in the past, they have almost uniformly been resolved in the union's favor.*" 446 F.2d at 613. (Emphasis added.) The court cited *North Star Woolen Mill Co.*, 14 Lab. Arb. Rep. (BNA) 185 (1950) (Rader, Arb.); *L. Hyman Co.*, 13 Lab. Arb. Rep. (BNA) 800 (1949) (Brecht, Arb.); *Mays Landing Water Power Co.*, 12 Lab. Arb. Rep. (BNA) 860 (1949) (Brecht, Arb.). The Court of Appeals did not discuss the *Armour* case or even acknowledge it by citation.

Additional Sixth Circuit cases directly in point are *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (1972) ("in the active employ of the Company . . . on December 31"); *Baldwin-Montrose Chemical Co. v. International Union, United Rubber, Cork, Linoleum & Plastic Workers*, 383 F.2d 796 (1967).[10]

District Judge Larson made findings of fact concerning

[10]A sampling of additional arbitration cases directly in point: Tobe Deutschmann Corp., 35 Lab. Arb. Rep. (BNA) 179 (1960) (Wallen, Arb.) ("in the employ of the employer" as of April 1); Vulcan Corp., 28 Lab. Arb. Rep. (BNA) 633 (1957) (Howlett, Arb.) ("on the Company payroll as of May 31, 1956"); Wamsutta Mills, Inc., 34 Lab. Arb. Rep. (BNA) 158 (1959) ("in the employ of the employer's mill on June 1 . . . hereinafter called the 'eligibility date.' ") The arbitrator in *Wamsutta Mills* summarized reasoning found in twenty-nine earlier arbitration cases in the industry, which he said showed "marked uniformity" and demonstrated "a long line of decisions in favor of the union's position." 34 Lab. Arb. Rep. (BNA) at 162-163.

the arsenal of arbitral and judicial precedents strongly supporting petitioners' claim, including those cited in this petition. These cases were not offered solely as precedents in the common law tradition; they were offered as facts and became the basis for fact-finding, principally about how arbitrators approach cases similar to petitioners'. Besides reaching his own conclusion on the merits, Judge Larson found that petitioners' claim "would probably have been upheld by an arbitrator."

A critically significant fact and precedent in the pattern of cases considered by the district court was the *Wilson Co.* arbitration (App., pp. A-121 - A-129) (unreported), a case on all fours with the present case and involving the same industry and the present Union defendant. The Union sought vacations for the Wilson employees. Though arbitrator John Larkin accepted as proven the company's contention that for twenty years the parties' practice was not to grant vacations in plant closings preceding an "eligibility" date, he awarded vacations nonetheless, emphasizing the employer's control over and selection of the closing date. He also found violation of paragraph 9 of the labor agreement, which provided that powers reserved to the company would "not be used . . . *to avoid any other provisions of the Agreement.*" (Emphasis by the arbitrator.) In the present case the district court found that Swift's deliberate choice of closing date violated paragraph 10 of the labor agreement, which provided that powers reserved to management would "not be used . . . to avoid any of the provisions of this Agreement." (App., p. A-72).

As was true of the *Armour* case, the court of appeals neither discussed nor acknowledged by citation the existence of the *Wilson Co.* arbitration. And the court did not

discuss paragraph 10 of the Swift labor agreement, or address the district court's finding of fact concerning the probable outcome of an arbitration of petitioners' grievance. The present case, as decided, stands alone in the industry represented by Amalgamated, as one in which the claim of vacation entitlement was subjected to a hearing and was denied.

In reversing the district court, the court of appeals said: "We base our differing interpretation on the actual practice of the parties under the agreement, the bargaining history, and an alternative line of judicial and arbitral authority." The district judge fully analyzed practice and bargaining history and observed the witnesses, parts of whose testimony are referenced by the court of appeals. The Dissenting Statement describes the district court's findings and states that "Judge Larson's specific findings and the record dispute" the conclusions of the panel opinion of the court of appeals.

No alternative line of judicial authority was discussed by the appellate court. The principal arbitration case upon which the court relied involved a sale, as the court acknowledged, and circumstances that the arbitrator said created weaker "equities" than a close-down. *Kroger Co.*, 74-2 Lab. Arb. Awards ¶8633, at p. 5371 (1975) (Goetz, Arb.). Aside from references to dictum in two cases, where vacations were awarded, only two arbitration cases in point were cited. In one, the arbitrator confined himself to a limited issue as presented by the union's business agent. *American Zinc Co.*, 57 Lab. Arb. Rep. (BNA) 1140 (1971) (Ray, Arb.). In the other, the arbitrator expressed an unusually literal approach to the question, alluding to none of the considerations disclosed by the arbitral author-

ity referenced above. *Duquesne Brewing Co.*, 60 Lab. Arb. Rep. (BNA) 643 (1973) (Altrock, Arb.)

The Court of Appeals' Scope of Review Was Contrary to the Principle That Arbitration Is the Federally Preferred Method of Grievance Administration

The issue presented by conflict among the circuits is inseparable from issues concerning the appropriate standard of review, issues of fundamental importance to the effectuation of labor policies articulated by this Court in *Vaca v. Sipes,* 386 U,S. 171 (1967), and this Court's 1960 Trilogy of cases.[11] In a nutshell the problem is this: the court of appeals could create conflict among the circuits concerning applicable principles of construction (stated at a high level of generalization) only because it approached the issue as a legal one as to which no deference was owing the district court's findings and conclusions. If the appellate court's approach was proper, an important need to resolve conflict in the fashioning of federal law under LMRA § 301 is presented. As shown above, however, the court reviewed and reached a different conclusion on many "facts" in the course of its resolution of the contract issue, because the contract was a collective bargaining agreement. Yet no deference to the observance of witnesses and fact-finding by the district court was given. Moreover, though the federal district judge became a substitute for arbitration that petitioners were wrongfully denied, *see Vaca v. Sipes,* 386 U.S. 171 (1967), and was described in the Dissenting Statement as

[11]United Steel Workers v. Enterprise Wheel & Car Corp., 363 U S 593 (1960); United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steel Workers v. American Mfg. Co., 363 U.S. 564 (1960).

a "learned and experienced district judge," the court of appeals accorded his judgment no weight, while a mere arbitrator's similar judgment would have been essentially unreviewable. *See United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Arbitration of petitioners' grievance was scheduled to take a maximum of two days. They were entitled to union representation at no cost beyond dues earlier paid. Forced to seek the protection of a court under *Vaca,* and with their former union aligned against them, petitioners fully developed a trial record. As Swift points out in its brief below at pp. 1-2: "The district court proceedings extended over seven years. . . . Each party submitted hundreds of pages of briefs to the district court. . . The district court's findings of fact and conclusions of law are over fifty pages in length."

Yet it seems clear that at the end of this road a second, independent appraisal of petitioners' claim was made even though that involved the court of appeals in essentially de novo fact finding. Thus, under the approach of the court of appeals, the "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal law," *Vaca v. Sipes,* 386 U.S. at 182, becomes a right to have cost-free, relatively simple arbitration, with union representation, replaced by the full gamut of the federal judicial system in which the petitioners must survive two and potentially three (including this Court) independent appraisals of their claim, upon a record largely factual, and in the face of the combined resources of one of the country's largest unions and one of its largest companies.

Because the proper application of a collective bargaining agreement may require factual inquiries that go beyond the four corners of the agreement, and because in the present case the district judge resolved the contract issue as a substitute for an arbitrator, the case presents questions concerning the appropriate standard of review on the merits of the contract claim. These issues will be present in virtually every unfair representation/ § 301 case modeled on the teaching of *Vaca*. The issues and their implications for the sensible effectuation of important labor policies emerge with unusual clarity on the record in this case.

Considering the decision below on its own terms, conflict with the Sixth Circuit was acknowledged. Respondents may contend that the case involves merely a matter of contract interpretation, not worthy of this Court's attention. But the more that idea is pressed, the more concern there should be for the standard of review employed by the court of appeals. In any event, the court of appeals, by rejecting principles of construction fashioned by the Sixth Circuit, fashioned its own principles at an equally high level of generalization, principles that ostensibly are to apply within the Eighth Circuit. In appropriate cases the federal courts are to "fashion" "substantive law to apply in suits under 301(a)." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). And this Court has not shrunk from the task of supervising the development of appropriate principles of construction under § 301.[12]

As the Dissenting Statement points out, the panel decision is contrary to the weight of federal authority. The

[12]Walsh v. Schlecht, 429 U.S. 401 (1977); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

matter of justice to the large petitioner class involved in this case is not a trivial one. But plant closings are not uncommon across the land and by their nature affect employees wholesale and involuntarily. To the extent principles of construction announced by the federal courts control the outcome of what is obviously a recurring fact-pattern in plant closings, there should not be one rule of construction in one circuit and another rule in another circuit. This is particularly a matter of concern when it is remembered that most unions, as is certainly the case with respect to Amalgamated, represent employees on a national scale, crossing circuit boundaries even with respect to one employer as large as Swift. *Cf. Corning Glass Works v. Brennan,* 417 U.S. 188, 190-191 (1974) (conduct of employer, who's plants crossed circuit lines, held proper in one circuit, but improper in another.)

CONCLUSION

The record in this case presents with unusual clarity issues of long-term importance to employers and unions—an import that is read against the background of federal policy and the federal judicial system "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes,* 386 U.S. at 182. If the federally created remedy for such conduct is to operate effectively, that is, by providing the union and the employer with the incentive to avoid the necessity for resort by employees to the federal judicial system, guidance by this Court is required.

The opinion of the court of appeals reflects continued confusion concerning the relationship between a claim of

unfair representation and a claim of breach of contract in the context of grievance administration. As it now stands, a union is free to treat a member of the bargaining unit in any manner it chooses without fear of sanction so long as the grievance is ultimately determined to have no merit. As the lesson of this case teaches, that determination can not be made until the aggrieved employee (as well as the employer and union) have endured nine years of litigation with the attendant time, costs and obstacles that are now placed in the way of relief for a strong claim of unfair representation.

Guidance of this Court is needed concerning the parameters of a union's ability to use a valuable grievance as a bargaining tool to serve ends totally divorced from the interests of the grievants. Conflict among various groups represented by the same union recur on a regular basis and are a common thread in many unfair representation cases. Yet this Court has provided little guidance to the lower courts that grapple with this problem. The issue presented by this case, given the opinion of the court of appeals, is likely to occur on an even more frequent basis than in the past. The problem is highlighted in this case where the trade involves a claim under a collective bargaining agreement for vacation rights defined in a way that is not only common to this industry but to most industries. The import of the court of appeals decision is to require the collective bargaining agreement to be scruti-

nized, not by an arbitrator, but by the federal courts at all levels of trial and appeal.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
NOV 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-746

CHARLES N. BUCHHOLTZ and LESTER J. TAUER, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

SWIFT & COMPANY and AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

APPENDIX

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STATUTORY PROVISIONS INVOLVED

Labor-Management Relations Act
§ 301 (29 U.S.C. § 185)

§ 185. *Suits by and against labor organizations*

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

* * *

National Labor Relations Act, as Amended,
§ 7 (29 U.S.C. § 157)

§ 157 *Right of employees as to organization, collective bargaining, etc.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

* * *

National Labor Relations Act, as Amended
§ 8(b) (29 U.S.C. § 158(b))

§ 158. *Unfair labor practices.*

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86–257, Title II, § 201(e), Title VII, §§ 704(a)–(c), 705(a), 73 Stat. 525, 542, 545.

* * *

National Labor Relations Act, as Amended,
§ 9(a) (29 U.S.C. § 159 (a))

§ 159. *Representatives and elections – Exclusive representatives; employees' adjustment of grievances directly with employer.*

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employers in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c, d), 65 Stat. 601; Sept. 14, 1959. Pub.L. 86-257, Title II, § 201(d), Title VII, § 702, 73 Stat. 525, 542.

* * *

Title 28, United States Code, § 1337

§ 1337. *Commerce and anti-trust regulations.*

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress

regulating commerce or protecting trade and commerce against restraints and monopolies.

June 25, 1948, c. 646, 62 Stat. 931.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 78-1559, 78-1573, 78-1596

Charles N. Buchholtz and Lester J. Tauer, on behalf of themselves, and all others similarly situated,
Plaintiffs-Appellees, Cross-Appellants,

v.

Swift & Company, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,
Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the District of Minnesota

Submitted: January 10, 1979

Filed: September 7, 1979

Court of Appeals Revised Opinion
Before GIBSON, Chief Judge, ROSS, Circuit Judge,
and VAN SICKLE, District Judge.*

---

*The Honorable BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

ROSS, Circuit Judge.

Appellants Swift & Company (Swift) and Amalgamated Meat Cutters and Butcher Workmen of North America (Amalgamated) appeal from an adverse judgment in the district court, after a trail to the court, which held them liable for over $1,000,000 in damages.

The plaintiffs are a class of former Swift employees who pursued claims against their former employer and former union for breach of the collective bargaining agreement and breach of the duty of fair representation.

This claim arose out of Swift's closing of its South St. Paul, Minnesota meat packing plant on November 29, 1969. Employees at that plant strongly reacted to Swift's announcement that it would pay no vacation benefits for the subsequent year, which employees urged had already been earned in 1969. According to Swift, because the plant would not be open on December 28, 1969, and because the contract provided that one requirement for vaction eligibility was that an employee be on the "active payroll" of the company on that date, none of the employees met the criteria and none were eligible.

While the union initially pressed these employees' vacation pay claim, it later settled with Swift by withdrawing the vacation pay claim and obtaining pension benefits for other employees who were then active union members. This "swap" resulted in the Settlement Agreement of June 30, 1971 entered into between Swift and Amalgamated, which barred the union's right to further press the vacation pay claim with the company. The trade was made without the participation of the former employees.

The plaintiffs thereafter came to federal court, urging that the trade of its valuable vacation pay claim by the union was a breach of the union's duty of fair representation to them, and further, that the company had wrongfully refused to pay the

vacation benefits in violation of the collective bargaining agreement.[1]

The district court held Amalgamated and Swift liable, and apportioned the damages between them. In reaching its final decision, the district court concluded that it was unnecessary for the plaintiffs to have exhausted intra-union appeals, that the union by arbitrary conduct and with hostile discrimination had unfairly represented the plaintiff class, and that the company, under the court's reading of the contract, owed plaintiffs the vacation benefits. We reverse, based on our interpretation of the collective bargaining agreement.

Exhaustion of Intra-union Remedies

In its first line of defense in the district court, Amalgamated moved to dismiss plaintiffs' complaint by contending that plaintiffs had not exhausted internal union remedies provided by Amalgamated's constitution.[2] The district court denied the motion on grounds that the plaintiffs at the pertinent time were nonmembers who lacked standing to invoke remedies provided by the internal union mechanisms.[3]

As a general rule, where a union provides its members with an appeal procedure, resort to the means of appeal is required prior to consideration of the member's unfair representation claim in federal court. If such exhaustion is required generally,

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[1] Jurisdiction in this case in the district court was predicated upon 29 U.S.C. § 185.

[2] Article XIV

Section 3. Exhaustion of Remedies: No Local Union or other subordinate body, nor any member or officer thereof, nor any officer or member of the International Union, shall resort to any court or agency outside this International Union until all rights of membership, all forms of relief and avenues of appeal as provided by this Constitution and the Constitution of his Local Union have been exhausted.

[3] The district court concluded that "[i]t would be a useless act to require plaintiffs in an unfair representation suit to exhaust internal remedies when they have *ceased to be members* prior to discovery of the unfairness. *Mendicki v. U.A.W.*, 61 L.R.R.M. 2142 (D.C. Kan. 1965)." (Emphasis added.) We make no comment on this as a basis for excusing plaintiffs' nonexhaustion.

however, it is certainly not the case that the courts are powerless to exercise discretion by assessing the adequacy of the remedy afforded and thus the essential utility of mandating exhaustion in a given case.[4] "Generally, the courts will require an exhaustion of intra-union remedies in the absence of some showing that to do so would be futile or that the remedies are inadequate." *Foy v. Norfolk & Western Railway Co.*, 377 F.2d 243, 246 (4th Cir. 1967).

The Foy case, *supra*, utilized a statutory section of the Labor-Management Reporting and Disclosure Act, 29 U.S.C.A. § 411(a)(4). The *proviso* to that section (the *section* primarily *prohibits* a union from limiting the right of a member to institute an action in any court of agency) *permits* the use of an exhaustion requirement of limited duration prior to a court suit or administrative action.

> (4) Protection of the right to sue. – No labor organization shall limit the right of any member thereof to institute an action in any court * * * *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *

29 U.S.C.A. 411(a)(4).

In *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir. 1961) the Second Circuit concluded that "it appears clear that the proviso was incorporated *in order to preserve the exhaustion doctrine as it had developed and would continue to*

[4] "With these internal remedies so definitely available, resort to them, *or an adequate reason for a failure so to do*, is a prerequisite to equitable relief against the union or its officers in the federal courts." *Neal v. System Board of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965) (emphasis added).

develop in the courts, lest it otherwise appear to be Congress' intention to have the right to sue secured by § 101 abrogate the requirement of prior resort to internal procedures." (Emphasis added.)

From the § 411 jurisprudence the courts have, with varying outcomes, on a case-by-case basis, analyzed the futility, the adequacy of remedy, and the reasonableness of an exhaustion requirement in the context of a § 301 action alleging breach of contract and unfair representation. *See Chambers v. Local Union No. 639, International Brotherhood of Teamsters*, 578 F.2d 375 (D.C. Cir. 1978); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978); *Winter v. Local Union No. 639, International Brotherhood of Teamsters*, 569 F.2d 146 (D.C. Cir. 1977).[5]

We have carefully considered the posture of this case at the time the plaintiffs allegedly should have taken an intra-union appeal, and find no adequate remedy which such an appeal could have provided the plaintiffs.

> The dispositive legal issue is whether appellant had a reasonable and substantial likelihood of obtaining redress of their grievances (if their claims were meritorious) by pursuing the internal remedies of their individual craft unions. If it is clear they could, the District Court is

[5] In *Winter v. Local Union No. 639, International Brotherhood of Teamsters*, 569 F.2d 146 (D.C. Cir. 1978) the court cited two sources of possible "futility": "no adequate procedural route to the relief requested," and union hostility so great that a worker "could not hope to get a fair hearing, regardless of the procedures available." *Id.* at 149. Union hostility could be "inferred from the circumstances surrounding the grievance process" or shown by "citing concrete evidence of personal animus." *Id.* at 149-50. The court found no "futility" in the processes in that case.

The Seventh Circuit in *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978) considered the issue of whether the union was capable of "granting [plaintiffs] the relief that they seek." *Id.* at 1343. The court also inferred that in a proper case they might consider whether the union appellate bodies were "biased or otherwise incapable of conducting an independent review of the situation." *Id.*

The court, however, rejected a broad attack on the exhaustion procedures on the basis that the issues in that section 301 contract case did not involve matters of union discipline and internal policy.

> justified in dismissing their complaint for failure to do so. The appellants should not be denied a hearing on the merits of their claim, however, unless there was a genuine possibility that they could have obtained an adequate intra-union remedy.

Frederickson v. System Federation No. 114 of Railway Employees' Department, 436 F.2d 764, 768 (9th Cir. 1970). In the present case, not only did the union refuse to arbitrate the claim, it concededly gave up that claim to Swift in part for Swift's agreement to pay other claims in the amount of $928,200. The Settlement Agreement was then ratified by a vote of the then-members of the Local on June 21, 1971. It is difficult to understand how an appeal to the union hierarchy could have altered a binding, bilateral agreement between the union and the company, or have reversed the process at that point.

As the court said in *Chambers v. Local Union No. 639, International Brotherhood of Teamsters, supra*, 578 F.2d 375, in a similar situation:

> The union-company position antagonistic to appellants has hardened. Appellants are confronted with a settled decision which conforms to the contentions of the Union, and Kane [the employer] is willing to implement it. That decision, reached on the merits, if not otherwise improper, is final and binding on all parties as provided by the Agreement. Recourse to internal union procedures could not conceivably change thaat opinion. The seniority-roster-merger question has gone too far, and involves the company too deeply, for the plaintiff-employees to expect any reasonable chance of relief from subsequent internal union complaint proceedings.

Id. at 387.

The text of the Settlement Agreement entered into between Swift and Amalgamated described their action as "final and binding":

> WHEREAS, Local P-167, the International, and the Company have *now concluded a final and binding settlement* of such four grievance cases in accordance with paragraph 59 of said Grievance Procedure;
>
> NOW, THEREFORE, the International, Local P-167, and the Company agree as follows:
>
> 1. The International Local P-167 agree to withdraw from said Grievance Procedure *with prejudice* the following four grievance cases:
>
> South St. Paul Grievance Case No. 69-22
> South St. Paul Grievance Case No. 69-25
> South St. Paul Grievance Case No. 70-01
> South St. Paul Grievance Case No. 70-03

(Emphasis added.) Note also that the agreement ostensibly bound *all levels* of the union, both local and international, which distinguishes this case from a case Amalgamated relies upon, *Johnson v. Wilson Foods Corp. & Amalgamated Meat Cutters*, No. 77-2051 (D. Kan. July 5, 1978).[6]

We conclude that on this particular set of facts the chance for a resolution, other than union affirmation of its prior action, was doubtful; neither direct relief nor renouncement of

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[6] In *Johnson v. Wilson Foods Corp. & Amalgamated Meat Cutters*, No. 77-2051 (D. Kan. July 5, 1978), the court was explaining that the plaintiffs' failure to exhaust had deprived the union of the opportunity to reverse itself.

> The plaintiffs' failure to invoke intra-union grievance procedures deprived the International Union of two distinct opportunities to prevent the alleged breach of its duties of fair representation. First, under Article XIV, Section 1, of the Constitution, cited above, the International Union could have reversed or modified the challenged actions and decisions of the Local Union. Second, the International Union could have refused to approve the proposed plant closing agreement, thus precluding its ultimate execution under Article XXI, Section 2, of the Constitution.

the binding agreement with the company was probable. As the Supreme Court said in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), a case grounded on public policy considerations:

> If the member becomes exhausted, instead of the remedies, the issues * * * are never reached and an airing of the grievance never had.
>
> *Id.* at 425.

We therefore agree with the trial court that plaintiffs are excused from the requirement to exhaust, based on our view that there was no reasonable likelihood of a truly effective remedy had they pursued the process.

Breach of the Collective Bargaining Agreement – Merits of the Vacation Pay Claim

We have carefully reviewed the district court's construction of the contract terms, but have reached a different conclusion.[7]

We base our differing interpretation on the actual practice of the parties under the agreement, the bargaining history, and an alternatie line of judicial and arbitral authority.

[7]The district court's interpretation of the contract terms was based on the following analysis: 1. Absence from the "active payroll" on December 28, 1969 was the sole obstacle to receipt of vacation pay. 2. Presence on the active payroll on a recurring date was merely an administrative device for calculating an employee's credited service since the last vacation year. 3. Presence on the designated date was not meant to reflect any part of the service for earning a vacation. 4. Use of the phrase "active payroll" was in contrast to the status of employees on the benefit payroll or on layoff. The "active payroll" language had the effect of postponing credit for being on the benefit payroll until the employee returned to the active payroll.

Moreover: 1. The date selected by the company for closing the plant was timed to avoid the vacation pay provisions of the contract, "particularly the provision that 'vacation eligibility requirements are based on credited service.' " 2. *Even if* presence on the active payroll on December 28, 1969, was a condition of vacation eligibility, the company's unilateral decision to close on November 29 rendered it impossible for members of the plaintiff class to meet the conditions of eligibility. 3. In light of Swift's unilateral power to select the date of closing, requiring active payroll status on the 28th would allow the company to secure a windfall on wages owed to employees.

Further: 1. Past bargaining does not show any specific union demand for modification of the Master Agreement to provide for vacation pay for employees terminated by plant closings. Union demands "did include demands for pro rata vacation pay but such demands seemed to be focused on pro rata vacation pay for employees who retire and go on pension * * * such exclusion being contained in Paragraph 32 of the Master Agreement." 2. "Whatever the bargaining history may have been," the union never conceded that employees terminated by a plant closing were not entitled to vacation pay during the year of closing. In the June 30, 1971 Saint Paul Settlement Agreement "the Union not only did not concede that vacation pay was not payable, but * * * [provided] that it would be 'without precedent' on this subject." 3. A claim had been made by the employees in the Sioux City plant for vacation benefits when that plant closed. Pursuant to a settlement agreement the claim was paid.

The Master Agreement of 1967 between Amalgamated and Swift provided as follows, in pertinent part:

Vacations

30. *Vacation year* – Vacation eligibility requirements are based upon credited service. The period December 28 through the subsequent December 27 shall be considered the vacation year.

* * *

32. *Subsequent vacations* – An employe who has received his (or her) first vacation (excluding an employe scheduled to be retired on January 1) is hereafter eligible for subsequent annual vacations as follows:

(1) On December 28, provided that on said December 28 he is being carried on the active payroll and provided that he has at all times since his last vacation been on either the active payroll or a benefit payroll;

OR

(2) On December 28, provided that during the preceding 365 calendar days he has not been off the payroll for more consecutive days than sixty (60), Sundays and holi-

days included, and provided that on said December 28 he is being carried on the active payroll;

OR

(3) On December 28, provided that during the preceding 365 calendar days he has completed 270 calendar days on the payroll and provided that on said December 28 he is being carried on the active payroll;

OR

(4) On that date in the vacation year, following the vacation year in which the employe received his last vacation, by which the employe has either:

(a) Completed 365 calendar days of credited service without having been off the payroll for more consecutive days than sixty (60), Sundays and holidays included, while accumulating this credit for service, and provided that he is on that date being carried on the active payroll;

OR

(b) During the preceding 365 days completed 270 calendar days on the payroll, and provided that he is on that date being carried on the active payroll.

We conclude, contrary to the district court, that eligibility for a vacation requires that an employee be on the active payroll on December 28 or on a date *thereafter* ("[o]n that date in the vacation year, following the vacation year in which the employe received his last vacation * * *."). In other words, employment on the 28th represents not merely an administrative device, but a requirement for vacation eligibility.

The district court concluded that "[a]n employee's presence on the active payroll on a specified annually recurring day * * * was not designed to reflect any part of the *service* by

which an employee earns a vacation," and, therefore, noncompliance should not defeat the right to a vacation. Implicit in this analysis is the conclusion that vacation *is earned by working* a requisite number of days. According to the district court, the members of the plaintiff class had completed "270 days or more on the payroll of the company, thus satisfying the annual vacation year credited service requirement for a vacation."

Our review of the exhibits shows us, however, that in practice individuals who had "earned" their vacation in this manner were, nevertheless, denied vacation benefits when they were not present in the active employment of the company on the established eligibility date. While the collective bargaining agreement specifically excluded retirees, the practice was also to deny vacation benefits to those who were discharged, quit, had died, or who did not return to the active payroll due to sickness or layoffs, regardless of the number of days they had worked for Swift during the previous year.[8] This denial of otherwise "earned" benefits is supported by the testimony of Irving M. King, the union's lawyer during the time the collective bargaining agreement was in effect. King told the district

[8] Our review of the exhibit shows, for example, the following cases:

Name	Years of Credited Service	Last Day Worked	No. of Days on Payroll in Year Terminated	Reason for Leaving	Subsequent Year's Vacation
E. L. Alverson	12	9/27/68	270	Quit	None
H. J. Barrieau	37	10/ 6/67	279	Pension	None
C. Dochniak	38	12/14/67	348	Deceased	None
G. R. Korogi	26	10/16/68	289	Discharge	None

Another exhibit demonstrated a denial of vacation benefits to employees, who for reasons of sickness or accident, never returned to active status on December 28th, or thereafter, though their work record in the previous year was substantial.

Name	Last Day On Active Payroll	Reason not on Active Payroll	Years of Credited Service	Days on Payroll in Last Year on Active Payroll	Weeks of Subsequent Vacation Received
A. J. Peltier	12/22/67	S&A	29	356	None

court that "[w]e had no pro rata vacation under any circumstances, as I recall, for any person leaving the service of Swift and Company for any reason prior to December 28 * * * ." Richard Tagg, a longtime Swift executive, gave the same testimony.[9]

This situation existed and and was tolerated, but it was also from time to time the subject of union proposals for changes. Proposed changes had included eliminating a stated eligibility date (see pp. 2821 and 2806 of transcript) and establishing a pro rata system for vacations for all severed and retired employees (see p. 2815 of transcript).

In August 1964, in a document entitled *Suggested Contract Changes – Swift Contract* the union sought to modify provisions of the old 1961-1964 contract for the new agreement in 1964-67. Among the suggested changes were proposals to permit vacation benefits for employees retiring on January 1 (which had been specifically excluded by contract) and to eliminate the "December 31st active payroll requirement" from Paragraphs 32(2) and 32(3). Another memoranda of national contract demands written at the same time sought to:

[9]Tagg testified that based on his experience with Swift, and to the best of his knowledge, Swift had never made vacation payments to an employee who was not on the active payroll on the qualifying date and who did not return thereafter due to a plant closing or for any other reason. Trial Exhibit A-3 entitled "1961-1971 Vacations Paid to U.P.W.A. or A.M.C. & B.W. Members for Years Subsequent to Closings or Partial Closings of a Swift Plant for Which Records Are Still Available" shows that no vacation payments were generally made when a plant closed, although this exhibit must be viewed in light of its facially apparent limitation. The one exception to the general rule of nonpayment, which does appear on the exhibit, were benefits paid in the Sioux City, Iowa closing. Swift entered into a Settlement Agreement with the employees of the Sioux City plant to pay them vacation pay and the union thereby promised not to transfer employees en masse for the required *one* week to the nearby Omaha plant. This agreement provided that: "The above does not constitute a precedent for either party." In view of that express language, applicable to both union and company, and in view of the special circumstances involving a short distance to travel and only one week of duty required, we are unwilling to consider it at all in interpreting the collective bargaining agreement between them.

1. Establish full pro-rata system on vacations for workers retired *or otherwise severed*.[10]

2. Clarify vacation eligibility.

(Emphasis added.)

In the ensuing 1964-67 contract the language was not eliminated, however, and only the date was changed: "[a]nd provided that on said December 28 he [the employee] is being carried on the active payroll."

In a July 1967 memoranda prepared to analyze suggested changes for the 1967-70 Agreement which followed, the union's position again had been: "[T]hat the requirement in Paragraph 32 of being on the payroll on December 28 be deleted."[11] Again, however, the language appeared in the 1967-70 Master Agreement which followed.

Our job is to ascertain as authoritatively and as accurately as possible the intent of these private parties in their agreement. We have previously approved the necessity of venturing "outside the four corners of the contract itself" to ascertain intent and to determine the rights and duties of the parties. *UAW v. White Motor Corp.*,505 F.2d 1193, 1197 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

[10]King, the union's lawyer, testified at trial that he understood this bargaining demand would create a pro rata system for "*plant closing*." (App. Vol. IV at 1651.)

[11]The July 28, 1967 memoranda read as follows:

Union Position

(c) The Union indicated at the meeting and earlier that it has certain general proposals to make on the vacation provisions. On the basis of discussions subsequent to the meeting, the Union proposes that the 60 day break period referred to in paragraphs 31 and 32 be increased to 90 days; that the provision for 270 calendar days on the payroll be reduced to 240 days, and that the requirement in Paragraph 32 of being on the payroll on December 28 be deleted.

(d) Other items in the Armour agreement: pro rata vacation on retirement at age 62 or later, an option of cash in lieu of vacation for retiree – it is not clear whether these are problems in the Swift negotiations.

We conclude that the literal language of the agreement supports the interpretation that presence on the active payroll on December 28 is a precondition to vacation eligibility, and that this interpretation of the language is supported by the practice under the agreement and the collective bargaining history. A plant closing is obviously not identical to other causes of absence from active status on the eligibility date, but we think it is very persuasive evidence that the parties recognized that a vacation otherwise "earned" could be lost by failure to meet that condition. We do not quarrel with the general proposition that vacation pay is compensation for work; however, the parties agreed to a system with two eligibility requirements. In operation that system frequently denied benefits to employees who might have received a pro rata or full vacation benefit were it not for the eligibility date. They abided with it as to *all* other types of severance.

Moreover, this interpretation of the contract is supported by the reasoning in recent arbitral authority. In *Kroger Co. v. Retail Store Employees*, 74-2 Lab. Arb. Awards ¶ 8633 (1975) (Goetz, Arb.), the arbitrator reviewed the contract language and the parties' practice:

> Paragraph 4 provides that after an employee has qualified for his first one week's vacation, "he automatically qualifies for future one week's vacations as of January 1 of each year." Paragraphs 5 through 7 provide that after an employee has qualified for additional weeks of vacation (presumably as of his anniversary date), he "qualifies" for a future weeks vacation in the higher amount "as of January 1 of each year." Based on these provisions, it would appear that an employee has no right to any vacation pay until he has served beyond his first anniversary date, and *that thereafter he does not qualify for vacation pay until January 1 of the year in which the vacation is taken*. Under this interpretation, an employee who quits or who is discharged prior to

> January 1 of a given year cannot qualify for vacation pay for that year, regardless of how much work he may have performed for the Company during the preceding year. The uniform practice of the Company has been not to pay any vacation pay in such cases. *To this extent at least, vacation pay under this agreement cannot be viewed simply as an unconditional deferred wage payable under any and all circumstances to everyone who performs any work for the Company during the preceding year*.

Id. at 5370.[12] *See also Duquesne Brewing Co.*, 60 Lab. Arb. 642 (1973) (Altrock, Arb.) (plant close down) (emphasis added).

Compare moreover, the decision in *Infant Socks, Inc.*, 51 Lab. Arb. 402 (1968) (Moberly, Arb.) where the contract provided that: "Length of employment, for the purposes of determining eligibility for paid vacations, shall be determined as of June 30 of each year." *Id.* at 403. Citing this provision, the arbitrator distinguished cases with a clearly stated eligibility date. "The fact that the agreement does not require an employe to be on the employment rolls as of any particular date in order to be entitled to vacation benefits distinguishes this case from *Briggs v. Electric Auto-Lite*, 37 Wis.2d 275, 67 LRRM 2271 (1967) * * * ." *Id.*

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[12]In relying on this decision the court is cognizant that the *Kroger* arbitration involved a sale of a business where the former employees were reemployed, and not a plant close down, and that the arbitrator noted that the *equities* were stronger when employees were terminated by a plant shutdown.

However, the arbitrator also distinguished some of the plant close down cases from his own case on another factor: "[I]n most of the cases cited by the Union, the applicable agreements *included provisions not present here* providing *contractual* support for the conclusion that pro rata vacation pay should be paid." ¶ 8633, at 5371. (Emphasis added.)

In our view, the arbitrator's decision was grounded primarily on the contract language, which stated a vacation eligibility date, and which contained "no provision whatsoever for pro rata vacation pay." Although the present case involves a plant close down, our analysis based on the contract language is similar.

Similarly, in *Telescope Folding Furniture Co.*,, 49 Lab. Arb. 837 (1967) (Cox, Arb.) Arbitrator Archibald Cox granted vacation pay to three grievants, but would have denied it had the contract stated an eligibility date:

> Employees to be eligible for one (1) weeks vacation with pay shall have worked one hundred forty (140) working days prior to August 1st of the vacation year.
>
> (2) The agreement mentions August 1 only as a cut-off date for determining length of service and days worked in the vacation years. There is no clause stipulating that vacations shall be limited to workers on the payroll, or on the seniority list, or otherwise in the Company's employ, on August 1 or any other particular date. Such clauses are quite common in collective agreements, although they are probably omitted more often than they are included. *If there were such a clause in the Telescope contract, the Company's position would be correct. In fact there is none.* The arbitrator cannot ignore the omission of such critical words.

Id. at 838. (Emphasis added.) *See also American Zinc Co.*, 57 Lab. Arb. 1140 (1971) (Ray, Arb.) (plant closing).

We distinguish *Machinists & Aerospace Workers Local 2369 v Oxco Brush Division*, 517 F.2d 239 (6th Cir. 1975) because the court there found that denying vacation benefits in a "plant closing" would be inconsistent with the contract provisions extending benefits when employment was terminated for other reasons (release, resignation, layoff, death and retirement.) "These provisions are inconsistent with the position that employment on December 31st was an absolute requirement for vacation benefits." *Id.* at 245. In the present case, benefits were concededly denied for these "other reasons."

Accordingly, we conclude that in our opinion the plaintiffs were not eligible for vacation benefits under the terms of the contract to which each had agreed. We choose not to follow

that line of authority which would prorate vacation benefits because the company's unilateral action in effectuating the shutdown made employment on the disability date impossible. *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972). *See also Baldwin-Montrose Chemical Co. v. International Union, United Rubber, Cork, Linoleum & Plastic Workers*, 383 F.2d 796, 798 (6th Cir. 1967). We so hold not only because we do not agree with the reasoning thereof, but because in neither of these cases is there any discussion of the bargaining history of the parties or the past practices in other related situations. As set forth above, it is clear from the bargaining history and past practice in this case, the facts relating to which were not seriously controverted, that the union and its members *knew* or should have known that the contract did not provide for vacation benefits upon the closing of the plant, bargained to obtain them, and settled without the requested change.

Although we do not interpret the collective bargaining agreement as providing for vacation benefits, clearly other sections of the contract provided specific and substantial plant closing benefits to the employees. According to an exhibit submitted at trial monetary termination benefits amounted to $4,606,901.91, including separation allowances and gratuity payments for retiring employees. Nonmonetary benefits included interplant transfer rights and placement on company-wide waiting lists for openings at new plants, plus 26 weeks advance notice of the plant's closing. This is a clear indication that the negotiators were aware of the many monetary consequences of closing the plant, but did not agree on an exception to the requirement of being on the payroll on December 28 for vacation pay purposes.

As to the liability of the union for unfair representation we hold that because there was no contractual obligation on the part of Swift to pay the vacation pay, that under the circum-

stances of this case and considering the duty of the union to fairly represent the older employees too, the union could not be held guilty of unfair representation.[13]

Swift never conceded that the vacation pay had any merit whatsoever and in our opinion it was correct in its position. To say now, as indicated in the dissent to the denial of rehearing en banc, that the union should have proceeded to arbitration in hopes of obtaining a favorable arbitrator's decision or a compromise settlement is second-guessing of the most blatant type. It completely ignores the rights of the older employees who were paid retirement pay as a result of the settlement agreement.

Alternatively we hold that even if the result of an arbitration on the vacation pay issue *might* have resulted in an award to the plaintiffs, where the union is also processing claims for other employees which are arguably meritorious, and no clear showing has been made of bad faith in making a choice between the two claims, it cannot be said that in making the choice it made, the union unfairly represented the plaintiffs. The evidence adduced at the trial does not affirmatively show bad faith on the part of either Swift or the union and in a situation where, as here, the claim of one group of employees is highly doubtful it cannot be said that either Swift or the union acted arbitrarily or in bad faith in making the compromise decision that was made.

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[13]*See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

> To prevail against either the company of the Union, petitioners must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the Union.
>
> * * *
>
> Petitioners, if they prove an *erroneous discharge* and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union.

Id. at 570, 572 (emphasis added).

The district court held that the union acted in bad faith in refusing to process the vacation pay grievance to arbitration rather than drop it in favor of the retirement benefit claim, but the *cornerstone* to this finding of bad faith was the trial court's legal conclusion that Swift was contractually *obligated* to pay the vacation pay claimed. Since we have determined, as a matter of law, that Swift was not obligated under the contract to pay the claim (or at least in the alternative that the contract on its face didn't require it), the claim of bad faith must fall.

The other reasons given by the trial court for its finding of bad faith are not sufficient, even if true, absent a determination of Swift's contractual obligation to pay, to justify a determination of bad faith. These reasons include the filing of the grievance by the union and statements by its officers as to the validity of the grievance; Swift's alleged motivation in closing the plant when it did (which could not be imputed to the union and which was permitted under the contract); and the so-called swap. Rather, in our opinion, the union used its best judgment to obtain the maximum benefit for the largest number of its membership. It made the best of a contract it had been trying to change for several years without success.

Reversed and remanded with directions to dismiss the complaint of the appellees.[14]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[14]We have carefully considered the claims raised in the cross-appeal by the early retirees, the employees on the benefit payroll when the plant closed, and the remaining subclasses of plaintiffs who were denied vacation pay benefits. However, we conclude that the district court correctly denied these claims.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978

No. 78-1550

Charles N. Buchholtz and Lester J. Tauer, on behalf of themselves and all others similarly situated. Appellees,

vs.

Swift & Company

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Appellant.

No. 78-1573

Charles N. Buchholtz and Lester J. Tauer, on behalf of themselves and all others similarly situated, Appellants,

vs.

Swift & Company, Amalgamated Meat Cutters and Butcher Workmen of North America, Appellees.

No. 78-1596

Charles N. Buchholtz and Lester J. Tauer, on behalf of themselves and all others similarly situated, Appellees,

vs.

Swift & Company, Appellant.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO

Appeals from the United States District Court
for the District of Minnesota

JUDGMENT

Court of Appeals Judgment

These causes came on to be heard on the record of the United States District Court for the District of Nebraska and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby reversed.

And it is further ordered by this Court that these causes be and are hereby remanded to the said District Court with directions to dismiss the complaint of the appellees in accordance with this Court's opinion.

September 7, 1979

Order entered in accordance with Opinion:

/S/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 78-1559, 78-1573, 78-1596

Charles N. Buchholtz and Lester J. Tauer, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees, Cross-Appellants,

v.

Swift & Company, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,
Defendants-Appellants, Cross-Appellees.

Filed: September 7, 1979

Appeal from the United States District Court
for the District of Minnesota

Court of Appeals Order Denying Rehearing En Banc

Before GIBSON, Chief Judge, ROSS, Circuit Judge, and VAN SICKLE,* District Judge

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ORDER

The motion for rehearing en banc is denied. A revised panel opinion, together with a dissent from the denial of rehearing en banc by Judge Lay, joined in by Judge McMillian, is filed herewith. Also filed herewith is a concurring statement in the

*The Honorable BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

denial of rehearing en banc by Judge Heaney, joined in by Judge Bright.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Dissenting Statement Upon Denial of Petition for Rehearing En Banc.

Filed: September 7, 1979

Dissent from Denial of Rehearing En Banc

LAY, Circuit Judge, Dissenting, in
which Judge McMillian joins.

Upon failure of five or more judges to vote for a rehearing en banc in the above case, I wish to write this dissenting statement.

I must respectfully dissent from the denial of rehearing en banc for several reasons: (1) the panel decision is contrary to existing federal law and basic contract principles governing collective bargaining agreements;[1] (2) the panel decision ignores an independent jurisdictional basis for the claim of unfair representation against the union; (3) the panel opinion fails

[1]The panel opinion concedes that it disagrees on an important question of labor law with a sister circuit. This in itself should compel a rehearing en banc. If a majority of this court would agree with the Sixth Circuit's analysis in *Local 186, United Packinghouse Workers v. Armour & Co.*, 446 F.2d 610 (6th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) and *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972), as I feel they would after a plenary study, it would provide one less case for the Supreme Court to consider involving a division between circuits in an important area of labor law.

to recognize that existing case law under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, supports an independent claim against the union for unfair representation in this case; and (4) the panel decision fails to recognize the evidence from which a learned and experienced district judge[2] found bad faith of the union. In the context of a case involving a plaintiff class exceeding 1,000 employees and a judgment approximating one million dollars, these deficiencies of fact and law have resulted in an important decision in labor law, a decision rendered by the concurrence of only two circuit judges. These circumstances provide compelling reasons for this court en banc to reconsider the merits of plaintiffs' claim.

I. *Contract Claim.*

The overwhelming majority of the members of the plaintiff class[3] had completed 270 days or more on Swift's payroll in the year prior to the plant closing and therefore had satisfied the credited service requirement for vacation eligibility. The first sentence of the contract's vacation provision reads: "Vacation eligibility requirements *are based on credited service.*" (Emphasis added.) From this, the district court reasoned that vacation pay was "earned" for work performed in 1969.[4] Thus, the district court found "[t[he single obstacle to receipt by members of plaintiff class of vacations earned during 1969 was their absence from the company's "active payroll' on December 28, 1969." In considering the use of the December 28 date in the contract, the district court held it was "merely an

[2]The Honorable Earl R. Larson, Senior District Judge, District of Minnesota.

[3]The record reveals that 677 employees, 74 of which were terminated early, had satisfied the credited service requirement for vacation eligibility; 47 employees were awarded pro rata vacation pay.

[4]This construction of the contract is hardly startling. *See, e.g., Austin v. Sears, Roebuck & Co.*, 504 F.2d 1033, 1037 (9th Cir. 1974) ("A paid vacation is fairly understood as part of a worker's short-term return for labor; hence treating vacation time earned as a function of actual labor performed is not unreasonable."); *Foster v. Dravo Corp.*, 490 F.2d 55, 63 (3d Cir. 1973), *aff'd*, 420 U.S. 92 (1975) ("Vacation with pay . . . is normally and reasonably considered part of a worker's current or short term return for labor. Under this view, actual work time during a year provides a fair measure of the amount of annual vacation currently earned."); *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 371 (6th Cir. 1972) ("Absent contrary indication, vacation pay is viewed as compensation for work."); *Baldwin-Montrose Chem. Co. v. International Union, United Rubber Workers*, 383 F.2d 796, 798 (6th Cir. 1967) ("'Arbitrators and courts have long recognized that vacation pay is a fringe benefit paid in lieu of a direct wage increase and in that sense constitutes deferred wages.'"); *Kaftan v. Siegel*, 111 F.2d 429, 432 (2d Cir. 1940) ("A vacation with pay is in effect additional wages."

administrative device for spacing the recurring annual function of calculating an employee's ... credited service, since the last vacation year. Such an administrative device is necessary in an ongoing enterprise; it has no relevance or function to perform in a plant close-down termination of employment situation." The panel concedes the legitimacy of "the general proposition that vacation pay is compensation for work," *Buchholtz v. Swift & Co.*, No. 78-1559, slip op. at 16 (8th Cir. April 25, 1979), but it nonetheless holds that presence on the active payroll on or after December 28 is an additional and essential eligibility requirement.

Such a holding in the context of a plant closing is not in accord with the weight of federal law and gives undue emphasis to the eligibility date. Under the circumstances of this case there should be little doubt that plaintiff class had a vested right under the contract to vacation pay. *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972); *Local 186, United Packinghouse Workers v. Armour & Co.*, 446 F. 2d 610 (6th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). In *Armour*, an action concerning the company's liability for vacation pay to its employees when it closed its plant, the court noted the approach taken in labor arbitration:

> *When situations such as this have arisen in the past, they have almost uniformly been resolved in the union's favor.* In Mays Landing Water Power Co., 12 L.A. 861 (1949), the employer shut down before a date which ... was clearly an eligibility date. Nevertheless, the arbi-

trator granted vacation pay, stating that "The (eligibility date) is simply a device for finally implementing the results of accumulated employment experience. To ignore the accumulation of such past employment experience because of the impossibility of meeting the eligibility day is to give undue determinative significance to only one of the generally qualifying tests." *Id.* at 863. Similarly, in L. Hyman Co., Inc., 13 L.A. 803 (1949), where the contract was again clear that employees had to be "on the payroll" on a specified date, the arbitrator adhered to the concept that vacation pay is an earned right, based primarily upon service, and that the employees were entitled to full vacation pay when the plant closed prior to the eligibility date. *Accord:* Star Woolen Mill Co., 14 L.A. 185 (1950).

Id. at 613 (emphasis added).

Even absent the above reasons, the plaintiff class of employees are entitled to vacation pay because it was the company's action in closing the plant that prevented the employees from working until the December 28th date. Not only is that the precise holding of *Schneider, supra*, and *Armour, supra*, but it is also the alternative holding made by Judge Larson, which the panel opinion fails to discuss.

Judge Larson stated that "[e]ven if presence on the active payroll on December 28, 1969, was a condition of vacation eligibility, the company's unilateral decision to close the plant on November 29, and to terminate the members of plaintiff class on that date rendered it impossible for members of plaintiff class to meet the condition of eligibility." Accordingly, Judge Larson held that failure to satisfy the eligibility requirement would not preclude recovery of vacation pay under the contract.[5]

This analysis of the vacation pay issue in the context of a plant closing is not only supported by federal law, but also is in complete accord with traditional contract principles which provide that "[t]he occurrence of the event [i.e., presence on the active payroll on or after December 28] is eliminated as a condition if it is prevented by the fault of the promisor . . . " 6 A. Corbin, Contracts § 1362, at 509 (2d ed. 1962). In the instant case, Swift's closing of the plant rendered the employees' performance of the condition at the South St. Paul plant impossible. *Furthermore, the district court found that the plant closing date was chosen specifically by Swift in order to avoid paying earned vacations*. On these facts, Judge Larson's construction of the contract seems clearly justified – and correct. The panel opinion ignores this aspect of Judge Larson's ruling except to state that the panel "choose[s] not to follow that line of authority[6] which would prorate vacation benefits because the company's *unilateral* action in effectuating the shutdown made employment on the disability date impossible." *Buchholtz, supra*, slip op. at 19 (emphasis in original).[7]

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[5]In addition it should be noted that Swift's purposeful and unilateral prevention of satisfaction of the active service date condition clearly distinguishes this case from instances where employees voluntarily failed to fulfill the condition or where an employer terminated employees for cause. Thus, the panel's discussion, *Buchholtz, supra*, slip op. at 13-15, in no way undermines the efficacy of Judge Larson's ruling based on impossibility.

[6]The panel's distinction of *Machinists & Aerospace Workers Local 2369 v. Oxco Brush Div.*, 517 F.2d 239 (6th Cir. 1975) is a straw man. In *Aerospace* the court cited and relied upon the *Armour* and *Schneider* decisions.

[7]The panel's amended opinion now seeks support for its denial of plaintiffs' claim against Swift on the ground that:

> [I]t is clear from the bargaining history and past practice in this case, the facts relating to which were not seriously controverted, that the union and its members *knew* or should have known that the contract did not provide for vacation benefits upon the closing of the plant, bargained to obtain them, and settled without the requested change.

Judge Larson's specific finding and the record dispute this. Judge Larson stated:

> The past bargaining, and the plant closing history with respect to plant closings prior to the South St. Paul plant closing, taken together, do not show

II. *Unfair Representation Claim*.

Resolution of the contract claim in favor of Swift should not dispose of the claim against the union for its alleged failure to fairly represent the former employees who seek vacation pay. The union's duty to fairly represent employees, quite apart from the employer's obligation to comply with the terms of the labor contract,[8] stands "as a bulwark to prevent arbitrary union

any specific contention by or demand by the Union for modification of the Master Agreement to provide for vacation pay for employees terminated by a plant closing, in those terms, and particularly do not show any specific contention by or demand by the Union for modification of the Master Agreement to provide for vacation pay for the employees on the payroll 270 or more days prior to a plant closing. During the period for which Swift has records of closings there had been two plant closings in which the closing date was such that there were terminated employees who had 270 or more days on the payroll prior to termination, the Kearny, New Jersey closing in 1966 affecting at most 70 employees and the Sioux City Iowa closing of December 1968 in which there were at most 176 employees affected. No claim was made by the terminated Kearny, New Jersey employees for vacation pay and none was paid. A claim was made by the Sioux City employees and vacation pay was paid.

The contract modification demands made by the Union during the Master Agreement bargaining sessions in the years prior to 1969 did include demands for pro rata vacation pay but such demands seemed to be focused on pro rata vacation pay for employees who retire and go on pension, and these persons were specifically excluded from vacation pay that would otherwise have been earned during the year in which they retire, such exclusion being contained in Paragraph 32 of the Master Agreement.

Whatever the bargaining history may have been, the Union never conceded that employees terminated by a plant closing, who had been on the payroll 270 or more days were not entitled to, or could not assert a claim for, vacation pay earned during the year of closing. The Union demanded and received vacation pay for the terminated Sioux City employees. In the purported settlement agreement of June 30, 1971, the Union not only did not concede that vacation pay was not payable, but in fact preserved the claim, the written agreement providing that it would be "without precedent" on this subject.

Furthermore, Amalgamated official Fisher testified specifically there were no written or oral demands by the union prior to 1967 relating to vacation pay in the event of plant closing. Tagg's testimony specifically corroborates this. Furthermore, assuming there were bargaining efforts which the record disputes, it is difficult to accept that futile bargaining efforts can serve to broaden rights which do not otherwise exist. And finally, as the plaintiff class so cogently argues: it is hardly possible for a plant to develop past practices concerning the resolution of problems growing out of a closing of the plant.

[8]As the Supreme Court clearly stated, "[t]he claim against the union defendants for the breach of their duty of fair representation is a *discrete claim quite apart from the right of individual employees ... to pursue their employer ...* " *Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) (suit under the Railway Labor Act) (emphasis added).

conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The panel decision, which gives only perfunctory attention to the unfair representation claim apart from the contract discussion, reflects either abandonment of the court's "traditional supervisory jurisdiction," or a fundamental misconception of the nature of unfair representation suits.

As to the Section 301 charges, the panel has now amended its original opinion to provide an alternate holding that:

> [E]ven if the result of an arbitration on the vacation pay issue *might* have resulted in an award to the plaintiffs, ... where the union is also processing claims for other employees as to which the union considers its chances are greater than on the vacation pay claims, and in the absence of a clear showing of bad faith in making a choice between the two claims, it cannot be said that in making the choice it made, the union unfairly represented the plaintiffs.

(Emphasis in original.)

Quite apart from the breach of contract, such an analysis ignores 28 U.S.C. § 1337, which provides jurisdiction for an employee suit against the union for breach of the duty to fairly represent without regard to the presence of a contract breach. *Mumford v. Glover*, 503 F.2d 878, 883 (5th Cir. 1974). Here the complaint alleges under Section 1337 the failure of the union to adequately represent the class of former union members in negotiations with Swift on the vacation pay claim. The charge is the union recognized the validity of the claim, represented it would in good faith submit the claim to arbitration

and *then*, without notice or representation to the former union members, totally disregarded the rights of the class by asserting the grievance was "the property of the union" and trading it for benefits to the few remaining union members – benefits which by the way were not recognized or set forth in the collective bargaining agreement in any way. Discussion of the factual elements of this bad faith charge appears in part III of this dissent, but for now suffice it to say, this claim, which Judge Larson found to be valid, is totally independent of any breach of contract by Swift.[9]

Even under Section 301, however, an employee need *not* prove a breach of the collective bargaining agreement as an essential element of his suit against the union for its alleged failure to provide fair representation. *See, e.g., Czosek v. O'Mara*, 397 U.S. 25, 28 (1970); *Vaca v. Sipes*, 386 U.S. 171, 182-83, 190-98 (1967); *Kaiser v. Local 83*, 577 F.2d 642, 645 (9th Cir. 1978); *Minnis v. International Union, UAW*, 531 F.2d 850, 854 (8th Cir. 1975). Indeed, our court recently held that a discharged employee who had absolutely no contract right to reinstatement could nevertheless bring suit against the union for its alleged inadequate representation of his reinstatement claim in grievance procedures. *Id.* In *Minnis* the employee had presented evidence tending to demonstrate that if the union had processed his grievance, as it agreed to do, then the employer would have reinstated the employee. Notwithstanding the admitted absence of a contract breach, we held the employee's claim that the union's bad faith had resulted in his

[9]This court's previous decision in *Richardson v. Communication Workers*, 443 F.2d 974 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973), stated that a claim for damages denied, 414 U.S. 818 (1973), stated that a claim for damages arising solely from the union's unfair representation states a claim "*separate and distinct* from the Union's responsibility for its apportioned damage with the employer under § 301(a). There is no procedural bar to asserting this claim along with plaintiff's suit under Section 301(a)."

Id. at 983 (emphasis added).

failure to be reinstated would, if proven, give rise to union liability. *Accord, Kaiser v. Local 83, supra*.

Here the panel fails to recognize that regardless of the ultimate merit of the breach of contract claim, if the union traded this claim off in *bad faith*, such a claim of unfair representation would make the union liable under Section 301. Here the bad faith, as will be discussed, related to trading away a claim of the vast majority of former employees for a claim favoring only a few.[10] Plaintiff need only establish that the union acted in an arbitrary and discriminatory manner in bargaining off the vacation pay claim. The ultimate issue against the union is whether they exercised bad faith in doing so. Thus, in my judgment, the panel's opinion decides the case on a point of law that ignores a central issue.

III. *Bad Faith*.

I turn now to discussion of Judge Larson's finding of bad faith on the part of the union.

First, one must recognize that disputes will always arise under collective bargaining agreements and a union has considerable discretion to trade off claims in good faith which in some instances will benefit certain members more than others. Swift and the union rely primarily on decisions which so hold. Nonetheless the appropriate method for analyzing "trade-offs" by the union is evidenced by the Ninth Circuit's decision in *Local 13, International Longshoremen's Union v. Pacific Maritime Ass'n*, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). In that decision the court cogently reasoned as follows:

> We agree with appellees that a breach of the duty of fair representation would not be established merely by proof that the International union "swapped" a concession that section 17.81 applied to union officials for acceptance by

[10]The few included the officers of the union, etc.

the employers' association of the position that the contract limited the individual packing of sacks. In this practical world such issues, susceptible of no absolutely "right" solution, are often resolved by accommodation. Although such a choice might impose additional burdens upon union officials, including Velasquez, these burdens might be outweighed by benefits to working longshoremen. If the choice were motivated by a good-faith balancing of interests of different elements within the International union, it might well fall within the "wide range of reasonableness * * * allowed a statutory bargaining representative in serving the unit it represents." Ford Motor Co. v. Huffman, *supra*, 345 U.S. at 338, 73 S.Ct. at 686. "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." Humphrey v. Moore, *supra*, 375 U.S. at 349-350, 84 S.Ct. at 372.

However, a union's freedom of choice between competing interests is "subject always to good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, *supra*, 345 U.S. at 338, 73 S.Ct. at 686. *It must appear that "the union took its position honestly, in good faith and without hostility or arbitrary discrimination*," Humphrey v. Moore, *supra*, 375 U.S. at 350, 84 S.Ct. at 372, *for the union must "serve the the interests of all members without hostility or discrimination toward any*." Vaca v. Sipes, *supra*, 386 U.S. at 177 87 S.Ct. at 910.

(Emphasis added.)

The court continued:

Recognizing that the materials before the district court would support an inference that if a "swap" occurred it was a good-faith choice between interpretations of two provisions of the contract, the evidence we have cited is also susceptible of a different inference, namely, that the International union, actuated in part by hostility toward Velasquez, elected to sacrifice him for a favorable outcome on the "belly-packing" issue. If a "swap" occurred, and if the deregistration of Velasquez rather than an alternative interpretation of section 17.81 was the true consideration, Local 13 would be entitled to judgment. If the duty of fair representation is to stand "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional powers of redress by the provisions of federal labor law," *id.* at 182, 87 S.Ct. at 912 the deliberate sacrifice of a particular employee as consideration for other objectives must be a concession the union cannot make. The issue was thus largely one of purpose.

Id. at 1067-68 (footnotes omitted).

This circuit has previously adopted a similar approach. In *Corcoran v. Allied Supermkts., Inc.*, 498 F.2d 527, 530 (8th Cir. 1974), for example, this court recognized the union's "right to settle the anticipated contract dispute ..." However, we made it clear that the union's power is always subject "to complete good faith and honesty of purpose in the exercise of its discretion." *Id.* (quoting *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). In that case we upheld the union's settlement of a contract claim that "was tenuous at best," where the record showed that the settlement benefited all employees, including those complaining of the settlement, and the union after careful consideration felt the contract claim probably would not prevail.

If this were simply the case of trading one valid claim for another in order to compromise a settlement, the panel's decision would at least present a palatable result. The facts, however, reveal much to the contrary.

The evidence credited by Judge Larson reveals the following scenario, which led to the "swap" of the vacation pay grievance. On or about May 29, 1969, Swift gave notice of the plant-closing effective November 29. Swift's decision to close the plant prior to December 28 was motivated by Swift's desire to avoid liability for vacation pay. A grievance was thereafter filed protesting that the timing of the closing was designed "deliberately to avoid provisions and benefits under the Master Agreement." The union local's grievance committee processed the vacation pay grievance through the first three steps of the five step grievance procedure. The local committee members as well as the officials of the International (Amalgamated), believed the grievance was meritorious.[11] Plaintiffs were never informed by any union officials that their grievances were without merit. On July 15, 1970, after the members of the plaintiff class had been terminated, a fourth step meeting was held between Swift, the local and Amalgamated in which the union officials again pressed the claim for vacation pay. The grievance was not resolved and Amalgamated immediately requested arbitration. Arbitration was scheduled for April 1971. Amalgamated repeatedly represented to the plaintiff class that the vacation pay grievance would be arbitrated, and expressed confidence in the merits of the claim. On the eve of arbitration, however, Swift's representative became incapacitated and the arbitration was rescheduled for June 1971. On or about May 28, 1971, Swift announced an additional plant closing in South St. Paul which would affect most of the remaining employees.

[11] An Amalgamated official served on an arbitration committee involving a similar grievance that was resolved in favor of the union. In addition union officials were in contact with and discussed the vacation pay grievances with legal counsel for the Teamsters, who had a similar grievance with Swift. Counsel for the Teamsters told Amalgamated officials that he had advised the Teamsters that they had a meritorious claim. At no time did representatives of Amalgamated or its counsel represent to the Teamsters' counsel that the vacation pay claim was without merit or that Amalgamated did not want to arbitrate it.

The significance of this announcement cannot be overstated, for prior to this time Amalgamated's conduct had been consistent with the assurances repeatedly given by it to plaintiff class that the grievance would be submitted to arbitration. Shortly thereafter, at the union's request, Amalgamated, the Local, and Swift met in two "pre-arbitration" meetings ostensibly to discuss the grievances to be resolved in the upcoming arbitration. In fact, however, the union officials' purpose for engaging in these meetings was to determine whether the current employees and union members, who would be terminated as a result of the *second* plant closing, could receive extra-contractual pension insurance benefits. It is undisputed that pension benefits were not provided for in the contract and that the union had no grievance with the employer over this issue. It is also clear that the union's request for early pension benefits would not apply to any members of the plaintiff class. Swift stated that it would be willing to consider such a proposal but only if the union agreed to drop the vacation pay grievance in return. Amalgamated officials informed members of the local union that they did not have a strong bargaining position for the early pension benefits unless the vacation pay grievance was included in the negotiations. Faced with these prospects, the union, without notification to the plaintiff class, agreed to the "swap." Thus, plaintiffs' vacation pay grievances were withdrawn by Amalgamated not because the union believed they lacked merit, but rather because they were the only grievance against Swift that had "significant trading value." The trade was made without the consent or participation of plaintiffs – the former employees were not notified of the special meeting at which the settlement was ratified, nor did they participate in or vote on the proposed settlement. Judge Larson found these facts sufficient to show bad faith on the part of the union in processing the vacation grievance. We

simply substitute subjective judgment, in light of the record at hand, to say that this finding is clearly erroneous.

Having established the union's bad faith, it is incumbent upon the employees to show damages arising from the unfair representation. At this stage it is often crucial that the employees show a breach of contract. That is, in the typical case an employee contends that the union's unfair representation resulted in the employee's loss of contractual rights. In measuring damages, therefore, it is necessary to determine the scope of the employee's rights under the contract. If, however, the employee can show damages which are not dependent on the breach of a contract then the employee is entitled to recover notwithstanding the absence of a breach. As the Supreme Court noted in *Vaca v. Sipes*:

> The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. In this case, the employee's complaint was that the Union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement. But the damages sought by Owens were primarily those suffered because of the employer's alleged breach of contract. Assuming for the moment that Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the Union's failure to resort to arbitration, compare *Republic Steel Corp. v. Maddox*, 379 U.S. 650, with *Smith v. Evening News Assn.*, 371 U.S. 195, and if that failure was itself a violation of the Union's statutory duty to the employer from contractual damages which he would otherwise have had to pay. See pp. 185-186, *supra*. The difficulty lies in fashioning an appropriate scheme of remedies.
>
> . . . .

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

386 U.S. at 195-96, 197-98.

Here there is no problem measuring damages. The record is clear that, until it agreed to "throw-in" plaintiffs' vacation pay grievances, Swift had made a cash offer of only $8,000 to settle the grievances. When the vacation pay grievances were included in the settlement negotiations, the grievances were settled, Swift agreeing to provide benefits to the remaining members of the union which it valued at $928,200. Thus even assuming that plaintiffs were not entitled by virtue of the collective bargaining agreement to vacation pay, they were entitled to the value of the grievances relating thereto, which the union arbitrarily and in bad faith traded for pension and other financial benefits for the remaining members of the union. On these facts one need not be clairvoyant to determine the dam-

ages plaintiffs are entitled to recover due to the union's breach of its duty of fair representation.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Concurring Statement Upon Denial of Petition for Rehearing En banc.

Filed: September 7, 1979

Concurring Statement In Denial of Rehearing En Banc

HEANEY, Circuit Judge, Concurring, in which BRIGHT, Circuit Judge, joins

I would deny the petition for rehearing en banc because no useful purpose would be served by such a hearing. The briefs and records have been thoroughly studied by all judges and the opinions setting forth the contrasting views are clear and concise.

While I am unable to agree, as a matter of law, that "eligibility for a vacation requires that an employee be on active payroll on December 28 or on a date thereafter," I do agree with the alternate holding of the panel, *i.e.*, "if the result of an arbitration on the vacation pay issue *might* have resulted in an award to the plaintiffs, where the union is also processing claims for other employees which are arguably meritorious," and no clear showing has been made of bad faith, it cannot be said that the union unfairly represents a group within the union when it settles one grievance and foregoes the other.

Here, the pension grievance was arguably meritorious and bad faith has not been shown.

Plant closings, or reduction in force, will always be traumatic events. Older employees will usually insist that the greatest attention be paid to seniority and pension benefits. Younger employees will inevitably feel that transfer rights or some form of immediate cash benefits are of more importance. Indeed, in this case, 931 members of the plaintiff class have already received $4,355,000 in separation allowances and gratuities. As long as conflicting claims of various groups of employees are arguably meritorious, we must permit the union and the company to negotiate a settlement of the claims or submit them to arbitration; and when they have negotiated a settlement of all claims in good faith, then we cannot entertain an employee's action in federal court to recover for an alleged breach of contract with respect to the settled claims. To do so would be contrary to established labor policy. See *Vacca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Of course, the one exception to the rule is where bad faith has been clearly shown. That is not the case here.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Court of Appeals Original Panel Opinion

Submitted: January 10, 1979
Filed: April 25, 1979

Before GIBSON, Chief Judge, ROSS, Circuit Judge, and VAN SICKLE, District Judge.*

ROSS, Circuit Judge.

Appellants Swift & Company (Swift) and Amalgamated Meat Cutters and Butcher Workmen of North America (Amalgamated) appeal from an adverse judgment in the district court, after a trial to the court, which held them liable for over $1,000,000 in damages.

The plaintiffs are a class of former Swift employees who pursued claims against their former employer and former union for breach of the collective bargaining agreement and breach of the duty of fair representation.

This claim arose out of Swift's closing of its South St. Paul, Minnesota meat packing plant on November 29, 1969. Employees at that plant strongly reacted to Swift's announcement that it would pay no vacation benefits for the subsequent year, which employees urged had already been earned in 1969. According to Swift, because the plant would not be open on December 28, 1969, and because the contract provided that one requirement for vacation eligibility was that an employee be on the "active payroll" of the company on that date, none of the employees met the criteria and none were eligible.

While the union initially pressed these employees' vacation pay claim, it later settled with Swift by withdrawing the vacation pay claim and obtaining pension benefits for other employees who were then active union members. This "swap" resulted in the Settlement Agreement of June 30, 1971 entered

*The Honorable BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

into between Swift and Amalgamated, which barred the union's right to further press the vacation pay claim with the company. The trade was made without the participation of the former employees.

The plaintiffs thereafter came to federal court, urging that the trade of its valuable vacation pay claim by the union was a breach of the union's duty of fair representation to them, and further, that the company had wrongfully refused to pay the vacation benefits in violation of the collective bargaining agreement.[1]

The district court held Amalgamated and Swift liable, and apportioned the damages between them. In reachinng its final decision, the district court concluded that it was unnecessary for the plaintiffs to have exhausted intra-union appeals, that the union by arbitrary conduct and with hostile discrimination had unfairly represented the plaintiff class, and that the company, under the court's reading of the contract, owed plaintiffs the vacation benefits. We reverse, based on our interpretation of the collective bargaining agreement.

Exhaustion of Intra-union Remedies

In its first line of defense in the district court, Amalgamated moved to dismiss plaintiffs complaint by contending that plaintiffs had not exhausted internal union remedies provided by Amalgamated's consitution.[2] The district court denied the motion on grounds that the plaintiffs at the pertinent time were

[1]Jurisdiction on this case in the district court was predicated upon 29 U.S.C. § 185

[2] Article XIV

Section 3. Exhaustion of Remedies: No Local Union or other subordinate body, nor any member or officer thereof, nor any officer or member of the International Union, shall resort to any court or agency outside this International Union until all rights of membership, all forms of relief and avenues of appeal as provided by this Constitution and the Constitution of his Local Union have been exhausted.

nonmembers who lacked standing to invoke remedies provided by the internal union mechanisms.[3]

As a general rule, where a union provides its members with an appeal procedure, resort to the means of appeal is required prior to consideration of the member's unfair representation claim in federal court. if such exhaustion is required generally, however, it is certainly not the case that the courts are powerless to exercise discretion by assessing the adequacy of the remedy afforded and thus the essential utility of mandating exhaustion in a given case.[4] "Generally, the courts will require an exhaustion of intra-union remedies in the absence of some showing that to do so would be futile or that the remedies are inadequate." *Foy v. Norfolk & Western Railway Co.*, 377 F.2d 243, 246 (4th Cir. 1967).

The *Foy* case, *supra*, utilized a statutory section of the Labor-Management Reporting and Disclosure Act, 29 U.S.C.A. § 411(a)(4). The *proviso* to that section (the *section* primarily *prohibits* a union from limiting the right of a member to institute an action in any court or agency) *permits* the use of an exhaustion requirement of limited duration prior to a court suit or administrative action.

> (4) Protection of the right to sue. – No labor organization shall limit the right of any member thereof to institute an action in any court * * * *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *.

[3]The district court concluded that "[i]t would be a useless act to require plaintiffs in an unfair representation suit to exhaust internal remedies when they have *ceased to be members* prior to discovery of the unfairness. *Mendicki v. U.A.W.*, 61 L.R.R.M. 2142 (D.C. Kan. 1965)." (Emphasis added.) We make no comment on this as a basis for excusing plaintiffs' nonexhaustion.

[4]"With these internal remedies so definitely available, resort to them, *or an adequate reason for a failure so to do*, is a prerequisite to equitable relief against the union or its officers in the federal courts." *Neal v. System Board of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965) (emphasis added).

29 U.S.C.A. 411(a)(4).

In *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir. 1961) the Second Circuit concluded that "it appears clear that the proviso was incorporated *in order to preserve the exhaustion doctrine as it had developed and would continue to develop in the courts*, lest it otherwise appear to be Congress' intention to have the right to sue secured by § 101 abrogate the requirement of prior resort to internal procedures." (Emphasis added.)

From the § 411 jurisprudence the courts have, with varying outcomes, on a case-by-case basis, analyzed the futility, the adequacy of remedy, and the reasonableness of an exhaustion requirement in the context of a § 301 action alleging breach of contract and unfair representation. *See Chambers v. Local Union No. 639, International Brotherhood of Teamsters*, 578 F.2d 375 (D.C. Cir. 1978); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978); *Winter v. Local Union No. 639, International Brotherhood of Teamsters*, 569 F.2d 146 (D.C. Cir. 1977).[5]

We have carefully considered the posture of this case at the time the plaintiffs allegedly should have taken an intra-union

[5]In *Winter v. Local Union No. 639, International Brotherhood of Teamsters*, 569 F.2d 146 (D.C. Cir. 1978) the court cited two sources of possible "futility": "no adequate procedural route to the relief requested," and union hostility so great that a worker "could not hope to get a fair hearing, regardless of the procedures available." *Id.* at 149. Union hostility could be "inferred from the circumstances surrounding the grievance process" or shown by "citing concrete evidence of personal animus." Id. at 149-50. The court found no "futility" in the processes in that case.

The Seventh Circuit in *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978) considered the issue of whether the union was capable of "granting [plaintiffs] the relief that they seek." *Id.* at 1343. The court also inferred that in a proper case they might consider whether the union appellate bodies were "biased or otherwise incapable of conducting an independent review of the situation." *Id.*

The court, however, rejected a broad attack on the exhaustion procedures on the basis that the issues in that section 301 contract case did not involve matters of union discipline and internal policy.

appeal, and find no adequate remedy which such an appeal could have provided the plaintiffs.

> The dispositive legal issue is whether appellant had a reasonable and substantial likelihood of obtaining redress of their grievances (if their claims were meritorious) by pursuing the internal remedies of their individual craft unions. If it is clear they could, the District Court is justified in dismissing their complaint for failure to do so. The appellants should not be denied a hearing on the merits of their claim, however, unless there was a genuine possibility that they could have obtained an adequate intra-union remedy.

Frederickson v. System Federation No. 114 of Railway Employees' Department, 436 F.2d 764, 768 (9th Cir. 1970). In the present case, not only did the union refuse to arbitrate the claim, it concededly gave up that claim to Swift in part for Swift's agreement to pay other claims in the amount of $928,200. The Settlement Agreement was then ratified by a vote of the then-members of the Local on June 21, 1971. It is difficult to understand how an appeal to the union hierarchy could have altered a binding, bilateral agreement between the union and the company, or have reversed the process at that point.

As the court said in *Chambers v. Local Union No. 639, Inernational Brotherhood of Teamsters, supra*, 578 F.2d 375, in a similar situation:

> The union-company position antagonistic to appellants has hardened. Appellants are confronted with a settled decision which conforms to the contentions of the Union, and Kane [the employer] is willing to implement it. That decision, reached on the merits, if not otherwise improper, is final and binding on all parties as provided by the Agreement. Recourse to internal union procedures could not conceivably change that opinion. The seniority-roster-merger question has gone too far, and involves the company too deeply, for the plaintiff-employees to expect any reasonable chance of relief from subsequent internal union complaint proceedings.

Id. at 387.

The text of the Settlement Agreement entered into between Swift and Amalgamated described their action as "final and binding":

> WHEREAS, Local P-167, the International, and the Company have *now concluded a final and binding settlement* of such four grievance cases in accordance with paragraph 59 of said Grievance Procedure;
>
> NOW, THEREFORE, the International, Local P-167, and the Company agree as follows:
>
> 1. The International Local P-167 agree to withdraw from said Grievance Procedure *with prejudice* the following four grievance cases:
>
> South St. Paul Grievance Case No. 69-22
> South St. Paul Grievance Case No. 69-25
> South St. Paul Grievance Case No. 70-01
> South St. Paul Grievance Case No. 70-03

(Emphasis added.) Note also that the agreement ostensibly bound *all levels* of the union, both local and international, which distinguishes this case from a case Amalgamated relies

upon, *Johnson v. Wilson Foods Corp. & Amalgamated Meat Cutters*, No. 77-2051 (D. Kan. July 5, 1978).[6]

We conclude that on this particular set of facts the chance for a *resolution*, other than union affirmation of its prior action, was doubtful; neither direct relief nor renouncement of the binding agreement with the company was probable. As the Supreme Court said in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1958), a case grounded on public policy considerations:

> If the member becomes exhausted, instead of the remedies, the issues * * * are never reached and an airing of the grievance never had.

Id. at 425.

We therefore agree with the trial court that plaintiffs are excused from the requirement to exhaust, based on our view that there was no reasonable likelihood of a truly effective remedy had they pursued the process.

Breach of the Collective Bargaining Agreement – Merits of the Vacation Pay Claim

Even if the claim of *unfair representation* is meritorious, the plaintiffs will be unable to recover if their underlying complaint lacks merit. That is, unless we also conclude that Swift's

[6]In *Johnson v. Wilson Foods Corp. & Amalgamated Meat Cutters*, No. 77-2051 (D. Kan. July 5, 1978), the court was explaining that the plaintiffs' failure to exhaust had deprived the union of the opportunity to reverse itself.

> The plaintiffs' failure to invoke intra-union grievance procedures deprived the International Union of two distinct opportunities to prevent the alleged breach of its duties of fair representation. First, under Article XIV, Section 1, of the Constitution, cited above, the International Union could have reversed or modified the challenged actions and decisions of the Local Union. Second, the International Union could have refused to approve the proposed plant closing agreement, thus precluding its ultimate execution under Article XXI, Section 2, of the Constitution.

refusal to grant vacation pay was a breach of the collective bargaining agreement, the plaintiffs should not recover.[7]

We have carefully reviewed the district court's construction of the contract terms, but have reached a different conclusion.[8] Accordingly, we reverse.

[7]*See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

> To prevail against either the company or the Union, petitioners must not only show that their *discharge was contrary to the contract* but must also carry the burden of demonstrating breach of duty by the Union.
>
> * * *
>
> Petitioners, if they prove *an erroneous discharge* and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union.

Id. at 570, 572 (emphasis added).

[8]The district court's intrpretation of the contract terms was based on the following analysis: 1. Absence from the "active payroll" on December 28, 1969 was the sole obstacle to receipt of vacation pay. 2. Presence on the active payroll on a recurring date was merely an administrative device for calculating an employee's credited service since the last vacation year. 3. Presence on the designated date was not meant to reflect any part of the service for earning a vacation. 4. Use of the phrase "active payroll" was in contrast to the status of employees on the benefit payroll or on layoff. The "active payroll" language had the effect of postponing credit for being on the benefit payroll until the employee returned to the active payroll.

Moreover: 1. The date selected by the company for closing the plant was timed to avoid the vacation pay provisions of the contract, "particularly the provision that 'vacation eligibility requirements are based on credited service'." 2. *Even if* presence on the active payroll on December 28, 1969, was a condition of vacation eligibility, the company's unilateral decision to close on November 29 rendered it impossible for members of the plaintiff class to meet the conditions of eligibility. 3. In light of Swift's unilateral power to select the date of closing, requiring active payroll status on the 28th would allow the company to secure a windfall on wages owed to employees.

Further: 1. Past bargaining does not show any specific union demand for modification of the Master Agreement to provide for vacation pay for employees terminated by plant closings. Union demands "did include demands for pro rata vacation pay but such demands seemed to be focused on pro rata vacation pay for employees who retire and go on pension * * * such exclusion being contained in Paragraph 32 of the Master Agreement." 2. "Whatever the bargaining history may have been," the union never conceded that employees terminated by a plant closing were not entitled to vacation pay during the year of closing. In the June 30, 1971 Saint Paul Settlement Agreement "the Union not only did not concede that vacation pay was not payable, but * * * [provided] that it would be 'without precedent' on this subject." 3. A claim had been made by the employees in the Soux City plant for vacation benefits when that plant closed. Pursuant to a settlement agreement the claim was paid.

We base our differing interpretation on the actual practice of the parties under the agreement, the bargaining history, and an alternative line of judicial and arbitral authority.

The Master Agreement of 1967 between Amalgamated and Swift provided as follows, in pertinent part:

Vacations

30. *Vacation year* – Vacation eligibility requirements are based upon credited service. The period December 28 through the subsequent December 27 shall be considered the vacation year.

* * *

32. *Subsequent vacations* – An employe who has received his (or her) first vacation (excluding an employe scheduled to be retired on January 1) is hereafter eligible for subsequent annual vacations as follows:

(1) On December 28, provided that on said December 28 he is being carried on the active payroll and provided that he has at all times since his last vacation been on either active payroll or a benefit payroll:

OR

(2) On December 28, provided that during the preceding 365 calendar days he has not been off the payroll for more consecutive days than sixty (60), Sundays and holidays included, and provided that on said December 28 he is being carried on the active payroll;

OR

(3) On December 28, provided that during the preceding 365 calendar days he has completed 270 calendar days on the payroll and provided that on said December 28 he is being carried on the active payroll;

OR

(4) On that date in the vacation year, following the vacation year in which the employe received his last vacation, by which the employe has either:

(a) Completed 365 calendar days of credited service without having been off the payroll for more consecutive days than sixty (60), Sundays and holidays included, while accumulating this credit for service, and provided that he is on that date being carried on the active payroll;

OR

(b) During the preceding 365 days completed 270 calendar days on the payroll, and provided that he is on that date being carried on the active payroll.

We conclude, contrary to the district court, that eligibility for a vacation requires that an employee be on the active payroll on December 28 or on a date *thereafter* ("[o]n that date in the vacation year, following the vacation year in which the employe received his last vacation * * *.") In other words, employment on the 28th represents not merely an administrative device, but a requirement for vacation eligibility.

The district court concluded that "[a]n employee's presence on the active payroll on a specified annually recurring day * * * was not designed to reflect any part of the *service* by which an employee earns a vacation," and, therefore, noncompliance should not defeat the right to a vacation. Implicit in this analysis is the conclusion that vacation *is earned by working* a requisite number of days. According to the district court, the members of the plaintiff class had completed "270 days or more on the payroll of the company, thus satisfying the annual vacation year credited service requirement for a vacation."

Our review of the exhibits shows us, however, that in practice individuals who had "earned" their vacation in this manner were, nevertheless, denied vacation benefits when they were not present in the active employment of the company on the established eligibility date. While the collective bargaining agreement specifically excluded retirees, the practice was also to deny vacation benefits to those who were discharged, quit, had died, or who did not return to the active payroll due to sickness or layoffs, regardless of the number of days they had worked for Swift during the previous year.[9] This denial of otherwise "earned" benefits is supported by the testimony of Irving M. King, the union's lawyer during the time the collective bargaining agreement was in effect. King told the district court that "[w]e had no pro rata vacation under any ciricumstances, as I recall, for any person leaving the service of Swift and Company for any reason prior to December 28

[9]Our review of the exhibit shows, for example, the following cases:

Name	Years of Credited Service	Last Day Worked	No. of Days on Payroll in Year Terminated	Reason for Leaving	Subsequent Year's Vacation
E. L. Alverson	12	9/27/68	270	Quit	None
H. J. Barrieau	37	10/ 6/67	279	Pension	None
C. Dochniak	38	12/14/67	348	Deceased	None
G. R. Korogi	26	10/16/68	289	Discharge	None

Another exhibit demonstrated a denial of vacation benefits to employees, who for reasons of sickness or accident, never returned to active status on December 28th, or thereafter, though their work record in the previous year was substantial.

Name	Last Day On Active Payroll	Reason not on Active Payroll	Years of Credited Service	Days on Payroll in Last Year on Active Payroll	Weeks of Subsequent Vacation Received
A. J. Peltier	12/22/67	S&A	29	356	None

* * * ." Richard Tagg, a longtime Swift executive, gave the same testimony.[10]

This situation existed and was tolerated, but it was also from time to time the subject of union proposals for change.

In August 1964, in a document entitled *Suggested Contract Changes – Swift Contract* the union sought to modify provisions of the old 1961-64 contract for the new agreement in 1964-67. Among the suggested changes were proposals to permit vacation benefits for employees retiring on January 1 (which had been specifically excluded by contract) and to eliminate the "December 31st active payroll requirement" from Paragraphs 32(2) and 32(3). Another memoranda of national contract demands written at the same time sought to:

1. Establish full pro-rata system on vacations for workers retired or otherwise severed.

2. Clarify vacation eligibility.

In the ensuing 1964-67 contract the language was not eliminated, however, and only the date was changed: "[a]nd provided that on said December 28 he [the employee] is being carried on the active payroll."

In a July 1967 memoranda prepared to analyze suggested

[10]Tagg testified that based on his experience with Swift, and to the best of his knowledge, Swift had never made vacation payments to an employee who was not on the active payroll on the qualifying date and who did not return thereafter due to a plant closing or for any other reason. Trial Exhibit A-3 entitled "1961-1971 Vacations Paid to U.P.W.A. or A.M.C. & B.W Members for Years Subsequent to Closings or Partial Closings of a Swift Plant for Which Records Are Still Available" shows that no vacation payments were generally made when a plant closed, although this exhibit must be viewed in light of its facially apparent limitation. The one exception to the general rule of nonpayment, which does appear on the exhibit, were benefits paid in the Sioux City, Iowa closing. Swift entered into a Settlement Agreement with the employees of the Sioux City plant to pay them vacation pay and the union thereby promised not to transfer employees en masse for one week to the nearby Omaha plant. This agreement provided that: "The above does not constitute a precedent for either party." In view of that express language, applicable to both union and company, we are unwilling to consider it at all in interpreting the collective bargaining agreement between them.

changes for the 1967-70 Agreement which followed, the union's position again had been: "[T]hat the requirement in Paragraph 32 of being on the payroll on December 28 be deleted."[11] Again, however, the language appeared in the 1967-70 Master Agreement which followed.

Our job is to ascertain as authoritatively and as accurately as possible the intent of these private parties in their agreement. We have previously approved the necessity of venturing "outside the four corners of the contract itself" to ascertain intent and to determine the rights and duties of the parties. *UAW v. White Motor Corp.*, 505 F.2d 1193, 1197 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975). We conclude that the literal language of the agreement supports the interpretation that presence on the active payroll on December 28 is a precondition to vacation eligibility, and that this interpretation of the language is supported by the practice under the agreement and the collective bargaining history. A plant closing is obviously not identical to other causes of absence from active status on the eligibility date, but we think it is at least some evidence that the parties recognized that a vacation otherwise "earned" could be lost by failure to meet that condition. We do not quarrel with the general proposition that vacation pay is compensation for work; however, the parties agreed to a system with two eligibility requirements. In operation that system frequently denied benefits to employees who might have received a pro rata or full vacation benefit were it not for the eligibility date.

[11] The July 28, 1967 memoranda read as follows:

Union Position

(c) The Union indicated at the meeting and earlier that it had certain general proposals to make on the vacation provisions. On the basis of discussions subsequent to the meeting, the Union proposes that the 60 day break period referred to in paragraphs 31 and 32 be increased to 90 days; that the provision for 270 calendar days on the payroll be reduced to 240 days, and that the requirement in Paragraph 32 of being on the payroll on December 28 be deleted.

(d) Other items in the Armour agreement: pro rata vacation on retirement at age 62 or later, an option of cash in lieu of vacation for retiree – it is not clear whether these are problems in the Swift negotiations.

Moreover, this interpretation of the contract is supported by the reasoning in recent arbitral authority. In *Kroger Co. v. Retail Store Employees*, 74-2 Lab. Arb. Awards ¶ 8633 (1975) (Goetz, Arb.), the arbitrator reviewed the contract language and the parties' practice:

> Paragraph 4 provides that after an employee has qualified for his first one week's vacation, "he automatically qualifies for future one week's vacations as of January 1 of each year." Paragraphs 5 through 7 provide that after an employee has qualified for additional weeks of vacation (presumably as of his anniversary date), he "qualifies" for a future weeks vacation in the higher amount "as of January 1 of each year." Based on these provisions, it would appear that an employee has no right to any vacation pay until he has served beyond his first anniversary date, and *that thereafter he does not qualify for vacation pay until January 1 of the year in which the vacation is taken*. Under this interpretation, an employee who quits or who is discharged prior to January 1 of a given year cannot qualify for vacation pay for that year, regardless of how much work he may have performed for the Company during the preceding year. The uniform practice of the Company has been not to pay any vacation pay in such cases. *To this extent at least, vacation pay under this agreement cannot be viewed simply as an unconditional deferred wage payable under any and all circumstances*

> *to everyone who performs any work for the Company during the preceding year.*

Id. at 5370[12] *See also Duquesne Brewing Co.*, 60 Lab. Arb. 642 (1973) (Altrock, Arb.) (plant close down) (emphasis added).

Compare moreover, the decision in *Infant Socks, Inc.*, 51 Lab. Arb. 402 (1968) (Moberly, Arb.) where the contract provided that: "Length of employment, for the purposes of determining eligibility for paid vacations, shall be determined as of June 30 of each year." *Id.* at 403. Citing this provision, the Arbitrator distinguished cases with a clearly stated eligibility date. "The fact that the agreement does not require an employe to be on the employment rolls as of any particular date in order to be entitled to vacation benefits distinguishes this case from *Briggs v. Electric Auto-Lite*, 37 Wis.2d 275, 67 LRRM 2271 (1967) * * * ." *Id.*

Similarly, in *Telescope Folding Furniture Co.*, 49 Lab. Arb. 837 (1967) (Cox, Arb.) Arbitrator Archibald Cox granted vacation pay to three grievants, but would have denied it had the contract stated an eligibility date:

> Employees to be eligible for one (1) weeks vacation with pay shall have worked one hundred forty (140) working days prior to August 1st of the vacation year.

[12]In relying on this decision the court is cognizant that the *Kroger* arbitration involved a sale of a business where the former employees were reemployed, and not a plant close down, and that the arbitrator noted that the *equities* were stronger when employees were terminated by a plant shutdown.

However, the arbitrator also distinguished some of the plant close down cases from his own case on another factor: "[I]n most of the cases cited by the Union, the applicable agreements *included provisions not present here* providing *contractual* support for the conclusion that pro rata vacation pay should be paid." ¶ 8633, at 5371. (Emphasis added.)

In our view, the arbitrator's decision was grounded primarily on the contract language, which stated a vacation eligibility date, and which contained "no provision whatsoever for pro rata vacation pay." Although the present case involves a plant close down, our analysis based on the contract language is similar.

> (2) The agreement mentions August 1 only as a cut-off date for determining length of service and days worked in the vacation years. There is no clause stipulating that vacations shall be limited to workers on the payroll, or on the seniority list, or otherwise in the Company's employ, on August 1 or any other particular date. Such clauses are quite common in collective agreements, alathough they are probably omitted more often than they are included. *If there were such a clause in the Telescope contract, the Company's position would be correct. In fact, there is none.* The arbitrator cannot ignore the omission of such critical words.

Id. at 838.)Emphasis added.) *See also American Zinc Co.*, 57 Lab. Arb. 1140 (1971) (Ray, Arb.) (plant closing).

We distinguish *Machinists & Aerospace Workers Local 2369 v. Oxco Brush Division*, 517 F.2d 239 (6th Cir. 1975) because the court there found that denying vacation benefits in a "plant closing" would be inconsistent with the contract provisions extending benefits when employment was terminated for other reasons (release, resignation, layoff, death and retirement.) "These provisions are inconsistent with the position that employment on December 31st was an absolute requirement for vacation benefits." *Id.*at 245. In the present case, benefits were concededly denied for these "other reasons."

Accordingly, we conclude that the plaintiffs were not eligible for vacation benefits under the terms of the contract to which each had agreed. We choose not to follow that line of authority which would prorate vacation benefits because the company's unilateral action in effectuating the shutdown made employment on the disability date impossible. *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972). *See also Baldwin-Montrose Chemical Co. v. International Union,*

United Rubber, Cork, Linoleum & Plastic Workers, 383 F. 2d 796, 798 (6th Cir. 1967).

Although we do not interpret the collective bargaining agreement as providing for vacation benefits, clearly other sections of the contract provided specific and substantial plant closing benefits to the employees. According to an exhibit submitted at trial monetary benefits amounted to $4,606,901.91, including separation allowances and gratuity payments for retiring employees, and nonmonetary benefits which included interplant transfer rights and placement on company-wide waiting lists for openings at new plants, plus 26 weeks advance notice of the plant's closing. This is some indication that the negotiators were aware of the many monetary consequences of closing the plant, but did not agree on an exception to the requirement of being on the payroll on December 28 for vacation pay purposes.

Conclusion

We do not reach the substantial issues of unfair representation raised by the handling of these former employees' claim by their union. We do conclude, without comment on the unfair representation issue, that the collective bargaining agreement did not provide for vacation benefits in this situation to any of the plaintiff class.[13]

Reversed and remanded with directions to dismiss the complaint of the appellees.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[13]We have carefully considered the claims raised in the cross-appeal by the early retirees, the employees on the benefit payroll when the plant closed, and the remaining subclasses of plaintiffs who were denied vacation pay benefits. However, we conclude that the district court correctly denied these claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 4-71-Civil 602

U. S. District Court Findings of Fact, etc.

The Court heard testimony and received exhibits on August 4, 5, 6, 7, 11, 13, 14 and September 15, 1975. Extensive and excellent pretrial and post-trial memoranda have been submitted. The Court also heard oral argument on September 15, 1975.

The Court makes the following:

FINDINGS OF FACT

1. Defendant Swift & Co. (Swift or Company) is a corporation incorporated under the laws of the State of Delaware and has its principal office in Chicago.

2. Swift operated a meat packing plant in South St. Paul, Minnesota, from approximately 1897 until all operations (except an adhesive-glue operation) were completely closed on or about November 26, 1971.

3. Prior to the closing of the major part of the plant or the shutdown of most of the plant operations as of November 29, 1969, Swift employed approximately 1,700 production workers at its South St. Paul plant. After that date there remained employed approximately 225 production workers and most of these workers remained employed until the closing of November 26, 1971; after that date approximately 30 employees continued in employment in an adhesive-glue department, which is still in operation. All employees, those terminated and those not terminated, were in one bargaining unit.

4. The defendant Amalgamated Meat Cutters and Butcher Workmen of North America (Amalgamated) is a labor organization and the successor by merger in 1968 to the United

Packing House Food and Allied Workers AFL-CIO, a labor organization.

5. In 1968 these two unions, Amalgamated and the United Packing House Food and Allied Workers AFL-CIO, merged.

6. The individual plaintiffs and the plaintiff class were employed by Swift at its South St. Paul plant during the calendar year 1969 and their employment was terminated between May 29, 1969, and December 27, 1969.

7. Plaintiffs were members of the bargaining unit represented by Amalgamated and Local P-167 (Local), the affiliated local union of Amalgamated. Those plaintiffs who had been employed by Swift at the South St. Paul plant prior to the merger of the two international unions, and this includes almost all of such plaintiffs, had been members of the United Packing House Food and Allied Workers AFL-CIO, and Local P-167, its affiliated local union. Almost all of the plaintiffs were members of these unions.

8. The union was the exclusive representative of the bargaining unit.

9. Swift and Amalgamated, or prior to 1968 Swift and the United Packing House Food and Allied Workers AFL-CIO, entered into written collective bargaining agreements, called "Master Agreement", which were renegotiated from time to time, and which established the wages and terms of employment of employees in the bargaining unit.

10. The Master Agreement (the written agreement in force at the time of the November 29, 1969, plant closing) provides for a five step grievance procedure, the last step of such procedure being arbitration, to resolve any dispute or claims by employees in the bargaining unit against Swift.

11. The first three steps of the grievance procedure are handled on a local level between Local and Swift.

12. The fourth step of the grievance procedure is handled by, and is the responsibility of, Amalgamated.

13. In the event no decision is reached by Amalgamated and Swift, the grievance may be submitted to arbitration, and the arbitration decision is final and binding on all parties. This is the fifth step of the grievance procedure. Amalgamated is directly responsible for arbitration; however, Local officials also participate.

14. During the period of the Master Agreement the arbitrator agreed upon by the parties was Professor Russell Smith, University of Michigan Law School, Ann Arbor, Michigan.

15. Amalgamated is responsible for, and handles, this fifth step, that is, arbitration and has the sole power to invoke the arbitration process on behalf of members of the bargaining unit.

16. Under the terms of the Master Agreement there is provision for 26 weeks notice of closing of any department or a plant. (Commonly referred to as "six months notice.")

17. On or about May 29, 1969, Swift gave the six month notice of the closing of the South St. Paul plant, to be effective November 29, 1969. The employment of the majority of the members of plaintiff class was to be, and in fact was, terminated on November 29, 1969.

18. The number of employees, most of whom are members of plaintiff class, whose employment terminated as of November 29, 1969, is approximately 1,100.

19. The Master Agreement provides for vacation benefits to employees, the length of the vacation being based generally on the number of years employment (credited service), one week annually commencing with the first vacation for which the employee qualifies, two weeks after three years employment, three weeks after ten years employment, and four weeks after

fifteen years employment. The pertinent terms of the Master Agreement then in force were as follows:

"Vacations"

"30. *Vacation Year* – Vacation eligibility requirements are based upon credited service. The period December 28 through the subsequent December 27 shall be considered the vacation year.

31. *First Vacation* – An employe [sic] becomes eligible for a vacation for the first time when the employment records show that either of the following requirements have been met:

(a) The completion of 365 calendar days of credited service without having been off the payroll for more consecutive days than sixty, Sundays and holidays included, while accumulating this credit for service.

OR

(b) As soon as the employment records show any consecutive 365 day period during which he has completed 270 calendar days on the payroll. (This requirement is not fulfilled unless at least one year has elapsed from the date of the employ's [sic] original employment.

32. *Subsequent Vacations* – An employe [sic] who has received his (or her) first vacation (excluding an employee scheduled to be retired on January 1) is hereafter eligible for subsequent annual vacations as follows:

(1) On December 28, provided that on said December 28 he is being carried on the active payroll and provided that he has at all times since his last vacation been on either the active payroll or a benefit payroll;

OR

(2) On December 28, provided that during the preceding 365 calendar days he has not been off the payroll for more consecutive days than sixty (60), Sundays and holidays included, and provided that on said December 28 he is being carried on the active payroll;

OR

(3) On December 28, provided that during the preceding 365 calendar days he has completed 270 calendar days on the payroll and provided that on said December 28 he is being carried on the active payroll;

OR

(4) On that date in the vacation year, following the vacation year in which the employe [sic] received his last vacation, by which the employe [sic] has either:

(a) Completed 365 calendar days of credited service without having been off the payroll for more consecutive days than sixty (60) Sundays and holidays included, while accumulating this credit for service, and provided he is on that date being carried on the active payroll;

(b) During the preceding 365 days completed 270 calendar days on the payroll, and provided he is on that date being carried on the active payroll."

Another provision of the Agreement, Section 33, grants one week annual vacation for the first year in which an employee is eligible for a vacation, two weeks per year beginning with the third vacation for which eligibility is established, three weeks per year beginning with the tenth vacation for which an employee becomes eligible, and four weeks annually commencing with the twentieth vacation eligibility, scaled down to fifteen years eligibility as of December 28, 1967. Vacation pay, under Section 35(a) is to be computed on the basis of 2.2

percent of the employee's gross earnings (excluding suggestion awards) for the previous calendar year for each week of the vacation that has been earned. (Provision is also made for alternative methods of calculating vacation pay under certain circumstances.)

20. Subsequent to the plant closing announcement of May 29, 1969, and repeatedly thereafter, Amalgamated, Local, the employees, and members of plaintiff class demanded that Swift pay to the employees vacation pay for the vacations that the employees claimed would be earned by employment in 1969 and which would have been taken in 1970. Swift denied any responsibility of liability for such vacation pay claim.

21. On October 21, 1969, Local, in accordance with its grievance handling procedures and as a result of the action of its grievance committee, filed a written grievance with Swift, designated Grievance No. 69-22. This written grievance demanded the payment of vacation pay, and as set forth in Paragraph VI of the Answer of defendant Union, was worded as follows:

> "Union contends that the company violated the Master Agreement when they gave notice to close the South St. Paul Plant on November 29, 1969, on May 29, 1969 by doing so deliberately to avoid provisions and benefits under the Master Agreement.
>
> Union requests that the Company comply with the Master Agreement and pay all vacations, pensions, holidays, S & A, and any and all other benefits and all monies lost due to the announcement of closing and the closing pursuant thereto."

22. When Swift's decision to close the plant and the date of proposed closing was announced, plaintiffs could determine that on November 29, 1969, they would have accumulated the

necessary service for a vacation under the formulas defining this service, but they would not be on the active payroll of the company on December 28 or after when the backward looking calculation of accumulated service would normally be made. In meetings between Swift, Local and Amalgamated officials immediately following the announcement of the proposed plant closing, union and employee concern was expressed about vacation benefits that would normally be received in the year 1970.

There was a meeting between the Executive Board of Local and W. W. Stewart of Swift on June 5, 1969, during which Douglas Hanson, a Local official, chairman of the grievance committee, raised the question of 1970 vacations. The response of Swift was that only 1969 vacations (that is, vacations based upon work performed in 1968) would be paid.

23. The claim for vacation pay by those members of plaintiff class who were terminated by Swift on or after November 29, 1969, and on or before December 27, 1969, and who had completed 270 calendar days on the "payroll" between December 29, 1968, and the date of termination, embodied in Grievance No. 69-22, is a valid claim under the contract, and under all of the facts and circumstances and inferences to be drawn (except as to those employees scheduled to be retired on January 1, 1970, or an earlier date, or who had actually retired during 1969) would probably have been upheld by an arbitrator.

(a) The first sentence of the vacation provisions in the Master Agreement defines vacation eligibility as follows:

"Vacation eligibility requirements are based upon credited service."

The second sentence defines the "vacation year" as the period from December 28 through the subsequent December 27. Subsequent provisions then define credited service in

terms of days completed during the vacation year on the payroll.

(b) Between December 29, 1968, and the closing of the plant on November 29, 1969, members of plaintiff class completed 270 days or more on the payroll of the company, thus satisfying the annual vacation year credited service requirement for a vacation.

(c) By performing credited service, members of plaintiff class earned vacation pay for work performed in 1969 as fully as they earned wages during that same period.

(d) The single obstacle to receipt by members of plaintiff class of vacations earned during 1969 was their absence from the company's "active payroll" on December 28, 1969.

(e) Presence on the active payroll as of a specified recurring annual date, as used in the vacation provisions of the Master Agreement, is merely an administrative device for spacing the recurring annual function of calculating an employee's presence on a payroll, *i.e.*, credited service, since the last vacation year. Such an administrative device is necessary in an ongoing enterprise; it has no relevance or function to perform in a plant close-down termination of employment situation.

(f) An employee's presence on the active payroll on a specified annually recurring day could not reasonably have been intended and clearly was not designed to reflect any part of the service by which an employee earns a vacation.

(g) Under the terms of the Master Agreement there is a benefit payroll, which is a concept for employees temporarily sick or disabled and receiving sick or disability benefits from the company pending their return to an active status. Days on the benefit payroll are credited towards vacation

eligibility. The active payroll language of the vacation provision has the effect of postponing credit for benefit payroll status until an employee returns to the active payroll.

(h) Use of the phrase "active payroll" in the vacation provision presupposes a system of categories of employees in an employment relation with Swift, such as employees on the active payroll, employees on the benefit payroll who would normally return to the active payroll, and employees in layoff who would normally return to the active payroll. An employee not on the active payroll on December 28 could have his credited service for vacation calculated at any time after December 28 when he returned to the active payroll.

(i) The compay's decision to close the plant as of November 29, 1969, timed as it was to take effect after members of plaintiff class would have performed more than enough credited service to earn a vacation, but before the arrival of December 28, 1969, purposely sought to avoid the vacation provisions of the contract, particularly the provision that "vacation eligibility requirements are based on credited service."

(j) It is the company's policy to accomplish all plant closings at the lowest possible cost.

(k) The South St. Paul closing was the product of continuing study, rather than of any sudden economic downturn or emergency which might dictate a particular closing date. There was a general long-range concern by the company about future liabilities for sewage assessments and increased taxes for a potential school bond issue, but neither of these liabilities was imminent or actual, and neither was a factor in the timing of a closing decision. Of all the factors stated by the company as those governing the selection of a closing date, none was exceptional or subject to sudden change so

as to point toward a November 1969 closing date. Attempted avoidance of vacation liability was the only variable that depended upon the selection of a November 29 date rather than a December 29 date.

(l) The company has on one or two prior occasions selected plant closing dates so as to deny liability for vacations. Vacation pay and potential liability therefore were expressed considerations in the company's selection of a closing announcement for the Sioux City plant closing. In a document entitled Sioux City – Beef Closing Proposal, dated June 14, 1968, from N. L. Dike to E. D. Fletchall (then a Swift Executive Vice President) it is stated in the final paragraph:

> "We request your approval of the above proposal so that employees and union management can be notified accordingly. Mr. Copeland (then officer in charge of beef, lamb and veal operations, and now president of Swift Fresh Meats Company) has requested that notification be made by June 21 so that closing may be scheduled for December 21, thus avoiding liability for 1969 vacations."

The Sioux City announcement was made on June 21, and the closing occurred on December 21, 1968. Swift did deny liability for vacation pay to the employees who would be terminated as of that date.

(m) The employees terminated by the Sioux City closing were paid their vacations earned during 1968 according to the following settlement agreement entered into between the company and Amalgamated:

> "The company agrees that as a result of the beef division closing, any employee who would have qualified for a 1969 vacation had he worked and been on the active payroll on December 23, 1968, will be considered as having qualified for his 1969 vacation.
>
> In view of this understanding the union withdraws all objections to the company's denial of interplant transfers from Sioux City to the closing Omaha plant.

The above does not constitute a precedent for either party." The terms and conditions of employment, including vacation eligibility, of the Sioux City employees were governed by the same Master Agreement that governed plaintiff class.

(n) The action of Swift in effecting the plant closing of November 29, 1969, was unilateral, that is, it was announced and carried out without the prior knowledge, approval or concurrence of Amalgamated, Local P-167 or the employees, including plaintiff class.

(o) Even if presence on the active payroll on December 28, 1969, was a condition of vacation eligibility, the company's unilateral decision to close the plant on November 29, and to terminate the members of plaintiff class on that date rendered it impossible for members of plaintiff class to meet the condition of eligibility.

(p) In a plant-closing context, the administrative requirement of presence on the active payroll on a specified date must be ignored or else it will be within the unilateral power of the company by controlling the timing of closing a plant to secure a windfall by receiving virtually a year of work from employees for substantially less wages than bargained for. The interpretation of the vacation provisions contended for by the company would apply as fully to a closing of a plant on December 27 of a given year as it does to the November 29 closing in the present case.

(q) Paragraph 10 of the Master Agreement reserves certain management power to the company, but expressly prohibits the use of the powers of management by the company to "avoid any of the provisions of this agreement." Paragraph 10 does not merely require the managerial power to be exercised in a manner consistent with the provisions of the agreement; it specifically prohibits the use of managerial power in a way that will avoid (evade) any provision of the agreement. The application of this paragraph does not require a finding of motive or purpose on the part of the company to avoid a provision of the agreement; it is enough that an exercise of managerial power has the effect of avoiding or evading contractual provisions.

(r) The past bargaining, and the plant closing history with respect to plant closings prior to the South St. Paul plant closing, taken together, do not show any specific contention by or demand by the Union for modification of the Master Agreement to provide for vacation pay for employees terminated by a plant closing, in those terms, and particularly do not show any specific contention by or demand by the Union for modification of the Master Agreement to provide for vacation pay for employees on the payroll 270 or more days prior to a plant closing. During the period for which Swift has records of closings there had been two plant closings in which the closing date was such that there were terminated employees who had 270 or more days on the payroll prior to termination, the Kearny, New Jersey closing in 1966 affecting at most 70 employees and the Sioux City, Iowa closing of December 1968 in which there were at most 176 employees affected. No claim was made by the terminated Kearney, New Jersey employees for vacation and none was paid. A claim was made by the Sioux City employees and vacation pay was paid.

(s) The contract modification demands made by the Union during the Master Agreement bargaining sessions in the years prior to 1969 did include demands for pro rata vacation pay but such demands seemed to be focused on pro rata vacation pay for employees who retire and go on pension, and these persons were specifically excluded from vacation pay that would otherwise have been earned during the year in which they retire, such exclusion being contained in Paragraph 32 of the Master Agreement.

(t) Whatever the bargaining history may have been, the Union never conceded that employees terminated by a plant closing, who had been on the payroll 270 or more days, were not entitled to, or could not assert a claim for, vacation pay earned during the year of closing. The Union demanded and received vacation pay for the terminated Sioux City employees. In the purported settlement agreement of June 30, 1971, the Union not only did not concede that vacation pay was not payable, but in fact preserved the claim, the written agreement providing that it would be "without precedent" on this subject.

24. Amalgamated supported Local in its demands for vacation pay and advised and encouraged the filing of a formal grievance.

(a) Amalgamated and the Local took the position that the employees had "earned" 1970 vacations and, as later appears in the written grievance, that the company's selection of the plant closing date was a maneuver to seek to avoid its obligation to pay 1970 vacations and that the Union would "fight" for vacations. This claim was so characterized by Charles Fischer, Amalgamated official, at a meeting of the grievance committee of Local held on June 18, 1969.

(b) On June 20, 1969, there was a meeting of Swift, the Local, and Amalgamated in which the Local officials and the Amalgamated officials were adamant in their demands that 1970 vacation benefits be paid.

(c) At a meeting held on June 18, 1969, Amalgamated official Charles Fischer demanded of Swift that vacation benefits be paid "because they have earned it."

(d) At a meeting between officials of Local and Swift held on July 31, 1969, there was again a demand that 1970 vacation benefits be paid.

(e) The Local was encouraged and advised by Amalgamated official Charles Fischer, who was chargd by Amalgamated with the responsibility for handling the vacation pay grievance in its fourth and fifth (arbitration) stages, to press the vacation pay grievance. At a meeting of the grievance committee of the Local held on November 6, 1969, Charles Fischer advised the Local to press the vacation pay grievance because "an arbitration case was won against Wilson & Co." Fischer had been an active participant on behalf of Amalgamated at Master Agreement bargaining sessions for ten or more years prior to 1969 and had personal knowledge of the demands or counterdemands made by Amalgamated in connection with the Master Agreement bargaining, including the demands and negotiations with respect to the wording of the vacation pay provisions of the Master Agreement.

(f) The reference is to an arbitration case in 1963 where the Union pursued a vacation claim similar to the one in this case against Wilson & Co. after that company closed its Memphis plant. The company had refused vacation pay because the employees were not employed on January 1, though they could meet accumulated service requirements.

The company proved that the Union had failed to pursue similar claims in four other plant closings, and asserted that for twenty years it had been understood that employees must be employed on January 1 to qualify for a vacation. A three man board of arbitration, chaired by John D. Larkin on which Mr. Fischer served as a member, awarded vacations. The chairman of the arbitration panel said in his opinion:

> "The company is persuasive in its undisputed statement that the union has not previously raised this issue, even though it has closed certain other plants since the adoption of the language found in Section 69. However, except for the closing of the Los Angeles plant in November, 1962, we have little information as to what the accumulated vacation rights might have been in the earlier cases. Here, it seems quite obvious that, as the union points out, the time selected for closing the plant was designed to deprive the employees of their earned vacations rights."

A reading of the opinion in the Wilson case discloses no evidence for the conclusion drawn by the panel concerning the company's motivation other than the proximity of the closing date to the asserted eligibility date.

(g) First and second step meetings with respect to the vacation pay grievance were held on October 21, 1969. On October 23, 1969, the grievance was submitted to Swift in accordance with the third step procedure.

(h) Swift submitted a written answer denying the vacation pay claims of the grievance, Grievance No. 69-22, dated November 3, 1969, and entitled "Second Step Answer Grievance No. 69-22."

(i) The third step procedures or meetings between Swift and Local were held on November 20, 1969, and December

4, 1969, with no resolution of Grievance No. 69-22, and such grievance therefore proceeded to the fourth step of the grievance procedure.

(j) On or about December 16, 1969, Amalgamated official Glenn Chinander, Assistant Director, wrote Amalgamated official Jesse Prosten, Co-Director, requesting that a fourth step meeting be arranged on Grievance 69-22. The official of the Amalgamated who was charged with the responsibility of handling this grievance in the fourth step procedure and the fifth step procedure (arbitration) was Charles Fischer of the Packing House Department of Amalgamated. On June 8, 1970, Fischer, by letter, advised the President of Local, Louis Sylvester, of the setting of a fourth step meeting on July 15, 1970, at St. Paul.

(k) The grievance was not resolved at this fourth step meeting and on July 21, 1970, Chinander sent a letter to Prosten requesting arbitration as soon as possible.

(l) Several weeks after the original plant closing announcement of May 29, 1969, there was a further announcement and notification by Swift to the union and the employees that there would be an extension of operations for certain departments beyond the originally announced closing date. Three separate grievances arose out of such extension of operations:

(1) The objection by the Local to the discontinuation by Swift of the production incentive plan which was filed as Grievance No. 69-25, filed with Swift on November 13, 1969.

(2) The objection of the Local to Swift maintaining or retaining employees on the payroll out of seniority, which was filed with Swift as Grievance No. 70-01, filed with Swift on November 29, 1969.

(3) The objection of the Local to the rehiring by Swift of employees out of seniority which was filed with Swift as Grievance No. 70-03, on April 21, 1970.

(m) The foregoing three grievances were processed through the first four steps of the grievance procedure. The two grievances that had been scheduled for arbitration in April 1971 were the vacation pay grievance and the incentive pay grievance. When the hearing date was postponed until June, the parties intended to arbitrate all four grievances. These four grievances were the grievances dismissed by Amalgamated and Local in accordance with the terms of the written settlement agreement dated June 30, 1971.

(n) The official of Swift charged with the duty and responsibility of handling the four grievances, including the arbitration of such grievances, was Richard Tagg.

(o) Fischer formally notified Tagg of the demand to arbitrate the vacation pay grievances, 69-22, and the production incentive pay grievance, 69-25, by letter to Tagg dated December 14, 1970.

(p) The designated arbitrator, Russell Smith, scheduled the arbitration hearing for the dates April 28 and 29, 1971.

(q) Legal counsel for the Union, both Amalgamated and the Local, in the arbitration proceedings was the law firm of Cotton, Watt, Jones, King and Bowlus, Chicago, Illinois, and such counsel would have appeared on behalf of the Union if the four grievances had gone to arbitration.

(r) The arbitration did not take place on the date scheduled because of the physical incapacitation of the Swift representative, Richard Tagg, and the arbitration hearing was rescheduled for June 23, 24, and 25, 1971. Tagg notified Amalgamated that he had sustained a back injury on

Sunday, April 25, and because of this injury the arbitration was not held and was postponed until June.

25. Plaintiff class was informed by Swift that transfers for the purpose of securing a vacation (by being on a payroll on December 28 or any day thereafter) would not be recognized by Swift as entitling them to vacation pay. Amalgamated advised the employees against transferring solely for vacation pay and assured them that the Union would handle their vacation pay claim.

(a) At the various meetings held during 1969 between Amalgamated, the Local and Swift, Swift took the position that the employees had no right under the Master Agreement to exercise transfer rights and transfer to other plants of Swift solely for the purpose of obtaining vacation pay, so as to be on the payroll on December 28, 1969, and thus be paid 1970 vacation pay benefits. At a meeting held on August 5, 1969, between Amalgamated, represented by Ray Wentz and Jesse Prosten, and Local, represented by its officers, and Swift, represented by Messrs. Morgan, Tagg, Bosard and Huston, Huston stated that transfers would be taken for work and not just for vacations.

(b) A meeting was held between Swift, Amalgamated, and Local on September 24, 1969. Swift was represented by Messrs. Huston, Morgan and Tagg; Amalgamated was represented by its officials Jesse Proston, Ray Wentz and Glenn Chinander; the Local was represented by its officials, including its president Perez and chairman of the grievance committee Douglas Hanson. Prior to meeting with the Swift officials the Union officials received a report from Prosten reaffirming that demand had been made for vacation benefits. When the Swift representatives joined the meeting, Huston, on behalf of Swift, informed the Union representatives that an employee would be on a conditional payroll if

he took a transfer to another plant and that Swift would fight paying vacation pay even though such employee was on a payroll of Swift on or after December 28, 1969.

(c) The position taken by Huston for Swift was in accordance with a policy memorandum prepared by Tagg.

(d) Amalgamated official Jesse Prosten had, during this period, that is the summer of 1969, criticized members of Local for advising fellow employees to take a transfer solely for the purpose of being on a Swift payroll on or after December 28 and thereby obtain vacation pay, informing such employees that the Union (Amalgamated) would handle this vacation pay claim.

26. Amalgamated represented to plaintiff class repeatedly, and at least up to the date of the announcement by Swift of the second plant closing (May 28, 1971), that the vacation pay grievance would be arbitrated.

(a) On January 27, 1971, plaintiff Tauer wrote to the president of Amalgamated expressing dissatisfaction with the Union's lack of progress in bringing the vacation pay grievance to arbitration after delay of fifteen months, expressing his suspicion that the inaction was due to the fact that the 1,500 former employees were no longer dues paying members of the Union. By letter dated January 29, 1971, the president responded denying the "dead file" charge of Tauer and stated:

"We will be anxious to know the outcome of your grievance against Swift & Co."

In addition, by letter dated February 2, 1971, Amalgamated vice president Ray Wentz responded to Tauer telling him that arrangements had been made with Swift for arbitra-

tion. Also, Charles Fischer, Amalgamated official, responded to Tauer's letter saying:

> "We have been very cognitive of the delay ... We have pushed the company repeatedly on the matter and until recently, they have been procrastinating badly ... The case will be arbitrated on April 26 or April 27, 1971 (before Russell Smith) ... A major cause for the delay is that the Teamsters have filed a similar grievance on behalf of their people. They advised that they wish to arbitrate it first, and then later reversed their position ...."

(b) On April 26, 1971, in a telephone conversation between plaintiff Tauer and Attorney Eugene Cotton, Cotton characterized the merits of the grievance to Tauer as a good grievance, and informed Tauer that the arbitration scheduled for April 28 and 29 had to be postponed.

27. At least until the date of the second plant closing announcement the conduct of Amalgamated, of which plaintiff class may or may not have been aware at the time, was consistent with the assurances repeatedly given by Amalgamated to plaintiff class that the grievance would be arbitrated.

(a) In closing the South St. Paul plant Swift terminated not only plaintiffs, but also Teamsters, members of Local 120, General Drivers, Helpers and Truck Terminal Employees Union. That Union had a written contract covering the period November 19, 1967, to November 19, 1970. The vacation pay provision of that agreement are a verbatim copy of the Master Agreement between Swift and Amalgamated. From the date of the plant closing announcement of May 29, 1969, the Teamsters, through their attorney Solly Robins, had asserted the right to 1970 vacation pay.

(b) At least by November 1969 the Teamsters and Swift were corresponding in an effort to agree upon an arbitrator

for the vacation pay grievance and other grievances. Swift proposed Professor Russell Smith; the Teamsters suggested a local arbitrator. Subsequently the Teamsters agreed to accept Professor Smith but Swift would not agree to a joint arbitration with Amalgamated and the Teamsters.

(c) On August 6, 1970, Attorney Irving King mailed to Jesse Prosten, an International official, a copy of the unreported Wilson & Co. arbitration decision described in some detail earlier herein. On August 24, 1970, Glenn Chinander, an official of Amalgamated, forwarded a copy of the Wilson decision to Solly Robins. Counsel for the union in the Wilson arbitration was Eugene Cotton.

(d) In a letter to Solly Robins, Eugene Cotton, the attorney for Amalgamated, also referred to the back and forth changes in the Teamsters plans as a source of uncertainty and difficulty for Amalgamated. Robins responded to Cotton by letter dated March 3 stating that he did not understand the criticism and stated:

> "We have never changed our position of wanting to arbitrate this issue; however we have been waiting for your client to decide when the arbitration should be held and under what circumstances ... otherwise having our group going into arbitration on this issue would be like the 'tailwagging dog'."

(e) Robins received no response to this letter and wrote to Cotton again on April 13, 1971, asking him to respond. On April 16, 1971, Robins wrote to Cotton telling him that the Teamsters would forward a copy of the Teamsters Master Agreement with Swift and on the same date the Teamsters Local did in fact do so.

(f) Solly Robins, on behalf of the Teamsters, had been in communication with Amalgamated officials Ray Wentz

and Glenn Chinander, and in discussions with Chinander told him that he, Robins, had advised the Teamsters that they had a meritorious claim. Robins had likewise been in a more or less continuous contact with Eugene Cotton, Amalgamated counsel, particularly after approximately February 12, 1971, and advised Cotton that the Teamsters wanted to get to arbitration and that Robins believed that we (Teamsters and Amalgamated) had a good claim. Robins suggested that the Teamsters and the Amalgamated grievance be arbitrated jointly, a proposal to which Amalgamated ultimately agreed, but to which Swift objected. Attorney Thomas Kayser also worked on the Teamsters grievance and was in contact with Irving King, Amalgamated counsel, and in telephone conversations with Irving King discussed the question of joint arbitration or the order or arbitration and no suggestion was made to him, Kayser, that Amalgamated regarded the grievance as being without merit, or that Amalgamated did not desire to arbitrate the grievance.

(g) In none of the various conversations between representatives of Amalgamated, or its counsel, and Teamsters counsel Solly Robins or Thomas Kayser was there any reference by Amalgamated to the bargaining history as an obstacle to be overcome in arbitration of the vacation pay grievance; there was no reference to bargaining history at all in such conversations nor was there any reference to the subject of bargaining history in the correspondence between Amalgamated, its counsel, and Teamsters counsel.

28. The Union's withdrawal of the vacation pay grievance was discriminatory both in purpose and effect.

29. The results of the settlement agreement can be rationalized only upon an hypothesis of discrimination by the Union against former Union members and employees, and in favor of then current Union members and employees.

30. The second plant closing announcement in May 1971 led to the development of a special interest in the vacation grievance by Local and Amalgamated directly opposed to the interest of the vacation pay claimants in pursuing their claim to arbitration. This special interest was derived from the then Local membership's self-interest in special pension benefits. It was linked to the vacation pay grievance only by the control which self-interested persons, as Union members, could assert, with the cooperation and encouragement of Amalgamated, over the grievance.

(a) On May 28, 1971 Swift announced the closing of the remaining meat packing departments at the South St. Paul plant to be effective November 26, 1971. This closing would result in the complete termination of meat packing operations (except adhesive-glue) operations by Swift at its South St. Paul plant, and would, and did, result in the termination of employment at that plant of the approximately 200 employees who had remained employed following the 1969 closing except for approximately 30 who remained in the adhesive-glue operation. These employees, or most of them, were members of Amalgamated and comprised the membership of Local P-167 as of that time.

(b) Prior to that date the arbitration hearing originally scheduled in late April had been rescheduled for June 23, 24 and 25.

(c) At no time prior to the date of the second closing announcement on May 26, 1971, had the Local, or members of plaintiff class, including named plaintiffs Lester Tauer and Charles Buchholtz, been advised by any official of Amalgamated, or by counsel for Amalgamated that the vacation pay grievance was without merit, or that it should not be arbitrated, or that it would not be arbitrated. There had been disagreement between Local, Amalgamated and Club

167 with respect to the cost of arbitration and by whom such cost should be paid.

(d) Neither Amalgamated nor Local requested of their counsel a formal legal opinion with respect to the merits of the vacation pay grievance, nor was any such formal opinion ever rendered by Amalgamated's counsel, Cotton, Watt, Jones, etc., or any other counsel.

(e) The vacation pay grievance, as well as the other three grievances described earlier herein, never reached arbitration. Within a few days after the final plant closing announcement of May 28, Amalgamated through Charles Fischer discussed the possibility of a meeting to talk about the grievances and as a result of this contact Swift, Amalgamated and Local met in Chicago on June 7, 1971. These meetings were termed by the parties "pre-arbitration" or "fourth and one-half step" meetings.

(f) Amalgamated through Charles Fischer and Local through its officers conceived and have stated that the purpose of the meeting was to determine whether or not there was a way in which the existing Master Agreement provisions governing close-downs could be broadened so as to provide additional benefits for those employees who would be terminated as of November 26, 1971. It was not the purpose of these meetings to negotiate disputed claims under the Master Agrement arising out of the 1971 closing; rather, it was their purpose to negotiate extra-contractual benefits for some or all of the employees who faced termination on November 26, 1971.

(g) From the beginning to the end of the two pre-arbitration meetings, discussion centered upon proposals to the company by the Union to provide early pension benefits for those employees who would be terminated in November 1971, and who would have thirty or more years of service

but would not then be 55 years of age. Such benefits were over and above any provided for by the Master Agreement. In connection with the extra-contractual pension benefits, the parties also negotiated concerning hospitalization insurance extension beyond the coverage rights provided in the Master Agreement, continuation of life insurance coverage, and related issues. The Union did not claim that these benefits were even arguably provided for by the Master Agreement. Amalgamated representative Charles Fischer characterizes the approach by the parties to these negotiations as follows:

> "Narrowly or technically, I don't recall anything that was in the Master Agreement at that time that was clearly in dispute between us and the company."

(h) During the course of these negotiations it was fully understood by all participants that the negotiations would not produce measurably significant extra-contractual benefits for the employees facing termination on November 26, 1971, unless the vacation pay grievance was placed on the table as bargaining material for the Union.

(i) During the early stages of the pre-arbitration negotiations, the focus of discussion among the participants was on a trade-off between the three non-vacation grievances that were scheduled for arbitration with the vacation grievance, and extra-contractual pension and insurance benefits for the older employees among those who faced termination in November 1971.

(j) Amalgamated representative Charles Fischer characterized the Union's approach to the early stages of negotiation by describing th attitude of the Local representatives who were present. He said that these representatives "initially . . . continued to feel quite strongly that the vacation grievance should be arbitrated or at least set aside for the

purpose of these discussions ... . We did set aside the vacation grievance and we discussed the other three."

(k) In return for the Union's withdrawal of the three non-vacation grievances, the company offered to provide pension benefits for those employees who were 54 years of age on the closing date when they reach 55 years of age. The company also offered to make an $8,000 cash payment in settlement of the production incentive grievance to be distributed according the the Union's directions. The Local calculated that this pension offer would affect twelve employees. In response to the company's offer, the Union made a counter proposal seeking pension benefits for all employees under 55 years of age who would have 30 years of service upon termination in November 1971.

(l) During a Union caucus at the June 7 meeting, Amalgamated representative Charles Fischer advised the Union's negotiation committee that it was his "feeling that if they were talking about things like improvements in the pension, hospitalization and so forth, that attempting to balance those benefits against the other three grievances would not put them in a very good bargaining position...."

(m) On June 8, 1971, Louis Sylvester reported on the June 7 Chicago meeting at a regular Local membership meeting. With respect to the company's offer to provide pensions at age 55 for those employees who would be 54 upon their termination, the minutes of this regular membership meeting recite;

> "The Union contends that this is not enough and we should get all our people a pension or at least a better package then [sic] they offered."

(n) When Local and Amalgamated representatives met again with Swift in Chicago on June 18, 1971, for pre-

arbitration discussions, they were prepared to and did offer withdrawal of the vacation grievance in return for extra-contractual pension and insurance benefits substantially greater than the pension benefits offered earlier by the company. This change of tactic by the Union and its impact are described by Amalgamated representative Charles Fischer as follows:

> "When the committee and I were in a position to advise the company that we were ready to deal with them in terms of all four grievances being withdrawn, it was at that point when we got into the heavy bargaining and that finally culminated in the settlement."

(o) Under the settlement agreement tentatively reached during the June 18 meeting, and ultimately executed by Swift, Amalgamated, and Local officials (the Local having been placed in trusteeship by Amalgamated six days prior to June 30, 1971, the date of execution), the Union – Amalgamated and Local – agreed to withdraw from the grievance procedure with prejudice the four grievances, including the vacation pay grievance, which had been scheduled for arbitration beginning June 23, 1971.

(p) In return for the Union's withdrawal of the four grievances, the company agreed to provide certain benefit options to two groups of employees listed in "Addendum A" and "Addendum B" of the settlement agreement. Addendum A employees are described as those employees actively employed at the South St. Paul plant on the date of the settlement agreement and who on November 26, 1971, will have thirty or more years of credited service and who will be 53 years of age or more, but not 55 years of age. Addendum B beneficiaries are described as those employees who are actively employed at the South St. Paul plant on the date of the settlement agreement and who on November 26, 1971,

will have thirty or more years of credited service and who will be less than 53 years of age. For Addendum A employees the company agreed to place such employees in lay off status on November 26, 1971, until the first day of the month following the employees 55th birthday, whereupon the company then shall certify to the Swift and Company pension board the employee's credited service and the fact of his attaining 55 years of age, thereby qualifying the employee for a pension under the Swift and Company pension plan for non-salaried employees. For each such employee, the company also agreed to make available during his lay off status and until the first day of the month following his attaining 55 years of age the hospitalization and major medical plan set forth in Exhibit III A of the Master Agreement. Finally, the company agreed to pay a separation allowance to the widow or dependents of any Addendum A employee who died before attaining 55 years of age. For Addendum B employees the company agreed to pay "a special monthly settlement compensation" to each employee commencing with the first month following such person's attaining 55 years of age and terminating with the month such person attains 65 years of age. The formula for determining the monthly compensation guaranteed that it could be no less than $6.50 times the number of years of credited service. The company also agreed for the period December 1, 1971, through November 30, 1973, to make available to such employees the hospitalization and major medical plan set forth in Exhibit III A of the Master Agreement, and the company agreed to make available to such employees, apparently without time limit, the Swift and Company group life insurance plan G-400 which was in effect on April 1, 1970. All the parties to the settlement agreement agreed that "nothing in this settlement agreement shall be viewed as having established a precedent binding on either party in any other

situation; however, it is understood and agreed that this settlement agreement may be used by the company, the International and/or Local P-167 in any arbitration, administrative proceeding or legal proceeding, or in any other controversy involving the company, the International and/or Local P-167." Addendum A, attached to the agreement, contained a list of thirty-five named employees. Addendum B contained a list of thirty-two named employees.

(q) This settlement agreement did not benefit in any way the former employees who had asserted the vacation pay grievance. The settlement agreement benefited only those members of Local P-167 who were then employed by Swift and whose names are listed in Addendum A and Addendum B. The settlement agreement did not contain benefits for anyone other than then members of Local P-167 since all persons who would benefit from the settlement agreement were then employed by Swift and were then members of Amalgamated and Local and these persons were eligible to participate and vote at the special membership meeting of June 21, 1971.

(r) Louis Sylvester and Curvan Krumm, president and treasurer of the Local, respectively, attended both the June 7 and June 18 pre-arbitration negotiations. Both are named as eligible employees on Addendum B of the settlement agreement. In addition to Sylvester and Krumm, James Comford and three other members of the Local's executive board attended the June 18 meeting. James Comford is listed as an eligible employee on Addendum A of the settlement agreement.

(s) The vacation pay grievance of named plaintiffs and the plaintiff class was withdrawn by Amalgamated not because it lacked merit, but because it had merit and significant trading value which became crucially necessary to

Amalgamated and those currently active employees who were members of the Local and sought extra-contractual pension and insurance benefits.

(t) The action of Amalgamated and Local officials and members in withdrawing the vacation pay grievance was taken without the consent or participation of the former employees who claimed under the grievance, and over the expressed objection of plaintiff Lester Tauer, who served as spokesman for these former employees who were members of Club 167. On June 17, 1971, Lester Tauer, signing himself as president of Club 167, wrote a letter to Louis Sylvester as president of Local P-167. In this letter Tauer states that the club's membership of 1,500 "do not want our local union to abandon the vacation grievance claim ... which is now scheduled to be heard on June 23 ...." Taking the position that unless all of the persons involved in the vacation greivance claim have consented the Local is not authorized to bargain away their rights, and that they have been advised by the NLRB that the Local is under a duty to represent them fairly, Tauer states:

> "You are hereby notified in writing that the members of Local 167 who are entitled to vacation benefits if we win the arbitration object to Local 167 using their claim as bargaining material for the settlement of other grievance claims."

(u) In spite of Tauer's letter to Sylvester, the settlement agreement which was then regarded as tentative was put to a vote of the Local membership at a special meeting held on June 21, 1971, and adopted by a vote of 115 in favor and 17 against. Those employees of Swift whose employment was terminated on or about November 29, 1969, as a result of the 1969 plant closing, including the plaintiff class, ceased to be members of the Amalgamated and the Local as of the

date of termination of employment with Swift. These former employees did not receive notice of the special membership meeting of the Local on June 21, 1971, called for the purpose of approving the proposed settlement, and did not participate in or vote on the proposed settlement.

(v) Louis Sylvester described the Local's attitude toward participation by former employees claiming under the vacation grievance as follows:

> "(Told Mr. Buchholtz that I did not want him telling the Local what to do about the grievance because I considered it the property of the Local Union) ... a number of times. And I told our people that this was a Local Union grievance, that we would have to handle it, we would have to push it, settle it. Whatever we did with it would be a Local Union thing to do with it. People from outside shouldn't be telling us what to do, or how to handle it. We didn't mind advice, but when they started directing us, it was something different. ... (I told) Mr. Buchholtz and others, in substance, not to tell (me) what to do because it was the Union's grievance, it was the property of the Union."

(w) The settlement agreement of June 30, 1971, resulted in potential monetary benefits to the 67 then employees named in Addendum A and Addendum B of approximately $1,528,200 less separation pay which they would otherwise receive of approximately $600,000, a net amount of approximately $928,200. This figure is based upon a monthly payment to any Addendum A or Addendum B employee who elected such benefit of $6.50 times years of seniority (which would not be less than 30 years, otherwise the employees would not be eligible to be listed on either Addendum A or Addendum B) times twelve months times ten years (from age 55 to age 65).

The willingness of Swift, and its agreement, to confer such early age pension or pension-like rights on the employees listed on Addendum A and Addendum B was attributable almost entirely to its obtaining a withdrawal with prejudice of the vacation pay grievance.

(x) Neither Local nor Amalgamated, during the pre-arbitration negotiations in June 1971, bargained for or acted on behalf of the vacation pay grievants, but, instead, directed their attention only to and bargained only for its then numbers.

Amalgamated and the Local conceived its or their duty of representation as a duty owing principally, if not exclusively, to those persons who were in June 1971 members of the Local and thus eligible as Union members to participate in the control of the disposition of the vacation pay grievance.

31. The Union's withdrawal of the vacation pay grievance, foreclosing its submission to arbitration, was arbitrary and capricious, and was unfair. The Union did not withdraw the grievance, that is, trade off the grievance for the reason now claimed that it had no merit, but rather because of its desire to use the value of the grievance to obtain the extra-contractual benefits for its then members. In any event, no appraisal by the Union of the merits of the grievance would justify the Union's appropriation of the bargaining value of the grievance to the benefit of those who had no interest in or right to the proceeds of the grievance.

(a) The vacation pay claim was a claim for earnings based on work earlier performed by grievants and members of plaintiff class.

(b) The vacation pay claim involved an aggregate value of at least $1,053,688.

(c) The cost of arbitration was estimated to be about $3,000. The maximum time estimated for the presentation of the case to an arbitrator was two days.

(d) There is and was a strong basis in reported arbitration and judicial opinions for a determination by the Union that the vacation pay claim was meritorious. The vacation provisions of this Master Agreement had never been tested before an arbitrator in the context of a plant-closing situation.

(e) The beneficiaries of the settlement agreement of June 30, 1971, had no legitimate interest in or claim to or "property" in the claims or the value of the claims represented by the vacation pay grievance.

(f) Favorable resolution of the vacation pay grievance by an arbitrator would have awarded earned compensation to grievants in excess of $1,000,000. Such a resolution of the grievance could not have had any adverse effect, but only a beneficial effect, on the contractual status of the beneficiaries of the settlement agreement, and all other persons in any of the bargaining units governed by the Master Agreement.

(g) Unfavorable resolution of the vacation pay claim could not have affected members of the plaintiff class more adversely than the settlement agreement. Such a resolution could have taken nothing from any member of a bargaining unit governed by the Master Agreement to which that person could assert a contractual claim or right. The only conceivable adverse effect unfavorable resolution could have had was the resolsution of an uncertainty that, so long as it was unresolved, might be used as trading material by the Union. A concession by the company that it owed vacation

benefits to members of plaintiff class would have had that same adverse effect.

(h) The Union's use of the trading value derived from uncertainty in such a way as to guarantee no benefit, no possibility of a favorable resolution, for members of plaintiff class, and to secure unrelated extra-contractual benefits for Union members who had no legitimate claim to the value irrationally favored those who were benefited at the expense of members of plaintiff class.

(i) Members of plaintiff class were as fully entitled to the fair, honest, good faith efforts of the Union to represent them as were those persons who continued to be employed by the company and to be members of the Union during June of 1971. No rational basis for the results of the settlement agreement, consistent with the Union's duty to represent both the former and the current employees, can be articulated. Had the Union proceded to arbitration of the vacation pay grievance, the current employees and members of the Union could have had no rational basis for a claim that the Union unfairly represented them.

32. Amalgamated did not act towards plaintiff class honestly and in good faith when it used and advised local to use the vacation grievance as bargaining material.

(a) The officials of Local who took part in the negotiations with Amalgamated and Swift, and who reported to the special membership meeting of the Local held on June 21, 1971, including specifically Louis Sylvester, then president of Local, were concerned about the fairness of trading off the vacation pay grievance in order to obtain benefits for themselves or other then members of Local. These officials, particularly Sylvester, expressed this concern to Amalgamated, through Charles Fischer, and sought his advice, dur-

ing or immediately after the June 18 meeting with Swift, inquiring of him (Fischer) whether the former employees including plaintiff class, could continue to assert their right to vacation pay notwithstanding the proposed, and as it turned out to be the final, settlement. Fischer informed Sylvester and the other Local officials that such former employees were free to bring an action in court and Sylvester so reported to the special membership meeting of June 21, 1971, and to plaintiff Charles Buchholtz. Sylvester was informed by Fischer that a letter would be forthcoming from Union counsel, Irving King, confirming Fischer's statement. Sylvester so reported at the special membership meeting of June 21, 1971, and also so reported to Charles Buchholtz. The only purpose that could be accomplished by this conversation between Fischer and Sylvester and other Local officials, and the reference to the letter that was to be received from Irving King, was to reassure Sylvester, and the other officials of Local, that the former employees including plaintiff class were not being treated unfairly or arbitrarily.

(b) Amalgamated in advising Local to throw in the vacation pay grievance as necessary bargaining material and in informing Sylvester and other officials of Local that former employees including plaintiff class were free to institute court action on their vacation pay claim, was not acting honestly, or in good faith. Any letter from Irving King, Amalgamated counsel, would have reassured the Local officials and the members who ratified the agreement only if it had advised them that the former employees could thereafter assert their vacation pay grievance by court action consistent with the continued validity of the settlement agreement. Amalgamated knew that such advice could not accurately and honestly be given. The letter promised by Charles Fischer was never transmitted.

33. Amalgamated was motivated by actual hostility toward plaintiff class, and Club 167 and plaintiff Tauer, both of whom had been championing the cause of the former members of Amalgamated.

(a) Increasing hostility by Amalgamated towards Club 167 was produced by a running dispute between the two organizations over the ownership and disposition of club assets. A dispute arose almost immediately after the announcement of the 1969 plant closing and continued beyond the date of the settlement agreement by which Amalgamated withdrew the vacation pay grievance in the summer of 1971.

(b) At a membership meeting of Club 167 on July 23, 1969, a vote was taken on a motion to concur in a recommendation of the executive board to suspend any action on selling the club's building until October. Glenn Chinander, an Amalgamated representative, spoke in favor of the motion. The motion failed. A motion was then introduced and seconded that the chairman have the authority to sell the building and club property. This motion carried.

(c) On October 28, 1969, the executive board of Local P-167 entertained a motion to purchase billfolds for the membership. This was later accomplished at a cost of some $4,300. In a letter to Victor Perez, then president of the Local, Ray Wentz, Amalgamated vice president, on November 26, 1969, objected to the spending of money by the Union on such items as billfolds, mentioning that in "reality" the Union does not have much money and owes several bills, including attorneys' fees; he stated:

> "I would assume that the members who are insisting on all this spending are perhaps the same ones who voted to give away the property, without any consideration as to who really owns the property."

(d) At a membership meeting of the Club on November 20, 1969, a motion to donate the Club's building to the City of South St. Paul was voted upon favorably.

(e) On approximately November 25, 1969, Amalgamated caused suit to be commenced in its name and in the name of Local P-167 as plaintiffs against Club 167, plaintiffs herein Tauer and Buchholtz, and other officers and trustees of Club 167. The complaint and the affidavit of Amalgamated vice president Ray Wentz (a restraining order was also obtained) alleged that the real estate, the building of the Club, was in reality owned by Local, that the Club had no authority to make a gift of the real estate to the City of South St. Paul, and that among other illustrations of the exchange of money between the Club and the Union the Club had transferred from time to time money for expenses incurred by Local in arbitration proceedings.

(f) A dispute arose in early 1970 with respect to the right of the terminated employees to continue as members and officers of Club 167; on January 13, 1970, the question arose but was not resolved about the right of Tauer to continue as an officer. This dispute, so far as the Club was concerned, came to a head at a membership meeting of March 3, 1970, at which time both Louis Sylvester, who by then had been elected president of Local, and plaintiff Tauer were nominated for the office of president. Sylvester and other remaining employees of Swift, and Amalgamated, through official William Nolan, objected to and challenged the right of terminated employees to continue as Club members and officers. Sylvester and Nolan were defeated by vote and Tauer was elected president.

(g) Thereafter, on approximately April 3, 1970, Amalgamated, et al, moved to amend its complaint in the action against Club 167 and its officers by seeking a decree to the

effect that only those persons present at the annual meeting who were on that date employed by Swift should be allowed to vote and that the election of Tauer be set aside and that Sylvester be declared president of Club 167.

(h) In August 1970 the Amalgamated suit against Club 167 was dismissed as a result of a settlement which in effect required that Club 167 sell its real estate to Local P-4 of Amalgamated.

(i) The demand or claim by Local and by Amalgamated that Club 167 should transfer to Local funds to pay the expected cost of arbitration of the vacation pay grievance, and other bills, more particularly an outstanding bill of the Local to attorney Savelkoul arising out of a Title Seven action, was continuously made during 1970 and 1971 and culminated in the second action by Amalgamated against Club 167 commenced on June 24, 1971, and described earlier herein. The directors of Club 167 on March 12, 1970, on the motion of Buchholtz, resolved to recommend to the membership that the Club pay all expenses to process the grievances then pending in arbitration.

(j) The Local demanded payment from Club 167, in advance, the cost of arbitration, estimated at $3,000, and an additional amount of approximately $15,000 to pay the longstanding bill of Savelkoul. At a Local executive board meeting of March 9, 1971, action was taken which, reflected in the minutes, was "to recommend to the membership to 'request that the Club 167, Inc. . . . loan ... $15,735 to Local P-167 to pay the longstanding bill . . . (and for) . . . a loan of $3,000.00 or more to pay the fee for preparation for arbitration and for arbitration'." The membership, on March 9, 1971, approved this recommendation. At the next executive board meeting of April 13, 1971, the minutes reflect that there was discussed the refusal of the board of Club 167 to

"loan the Local the money for the attorneys fee." At the next meeting of the Local executive board, of April 20, 1971, it was "suggested" that the executive board be authorized to "take legal action against Club 167 if necessary . . . to obtain funds that belong to Local 167." The same subject, request for money, came up at the May 11, 1971, meeting of the executive board of the Local.

(k) Club 167 had offered to pay all bills connected with the arbitration when submitted, but this offer was not acceptable.

(l) Amalgamated knew at the time of the pre-arbitration meetings that the decision had been made to place Local under trusteeship and to thereafter institute suit against Club 167, Inc., plaintiffs Charles Buchholtz and Lester Tauer, and other officers and directors of Club 167.

(m) Local P-167 was placed under trusteeship by order of the president of Amalgamated, Thomas J. Lloyd, who communicated such action to all officers, executive board members representatives and members of Local Union P-167 by letter dated June 24, 1971. Such letter gave as one of the reasons the failure and the past failure of the executive board and officers of Local to carry out their constitutionally and legally imposed obligations and responsibilities to preserve, safeguard and retrieve the assets of the Local Union, particularly the assets and the real estate sale proceeds received by Club 167, Inc.

(n) By Summons dated June 24, 1971, Complaint, Order to Show Cause and Restraining Order, suit was caused to be instituted by Amalgamated in its name and in the name of Local P-167 as plaintiffs against Club 167, Inc., plaintiffs Buchholtz and Tauer and other named and unnamed officials of Club 167. The Restraining Order, signed by Minnesota District Judge Robert J. Breunig, restrained

Club 167 from spending or undertaking to spend any funds in its name, making withdrawals from its account or writing checks, disposing of or selling or transferring any personal property and the like, and the complaint in general alleged that all such property was the property of Local. Among other allegations in the complaint is the allegation that Club 167 and its officers and directors refuse to release any funds to Local for the payment of its indebtedness and for the performance of its duties, including "the defense of lawsuits, processing of grievances, engaging in arbitration . . . ."

(o) The complaint further alleges that from and after November 1969 the defendant Club had wasted and dissipated tens of thousands of dollars by giving "parties" and similar activities.

(p) Local, prior to the imposition of the trusteeship, had demanded that Club 167 transfer sufficient funds to Local to pay for the arbitration and a long outstanding attorneys' fee bill of Donald Savelkoul, and the question had arisen at executive board meetings as to whether Local intended to commence suit against Club 167. Neither the executive board nor the membership of Local had ever authorized the institution of suit against Club 167. In early 1971 Amalgamated, through its official Glenn Chinander, requested Local to commence suit against Club 167 to recover funds held by Club 167 so that the Local could pay its bills, the Club having refused to give money to Local, and this was one of the reasons for the imposition of the trusteeship.

34. Amalgamated's processing of the vacation pay grievance was perfunctory.

CONCLUSIONS OF LAW

1. This action arises under the Labor Management Relations Act, 1947, as amended, Section 301; 29 U.S.C. Section 185, and The National Labor Relations Act, as amended, Sections 7, 8(b) and 9(a); 29 U.S.C. Sections 157, 158(b) and 159(a), and the Court has jurisdiction by virtue thereof and by virtue of Section 1337, Title 28, U.S.C.

2. This action is maintained and may be maintained as a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, with Charles N. Buchholtz and Lester J. Tauer as parties representative of a class consisting of all persons who were employed by Swift and Company at its South St. Paul meat packing plant at any time during the year 1969, and whose employment there was terminated between a time period beginning on or after May 29, 1969, and ending before or on December 27, 1969, and whose terms and conditions of employment were set forth, in whole or in part, in the agreement designated as "Swift and Company Master Agreement with the United Packinghouse Food and Allied Workers AFL-CIO, September 1, 1967, to September 1, 1970."

3. These proceedings, and these Findings of Fact and Conclusions of Law, with respect to the claims of plaintiff class that Amalgamated breached its duty of fair representation to them, are determinative of such issues as to the entire class.

4. However, notwithstanding the scope of the class as defined above, these proceedings and these Findings of Fact and Conclusions of Law as to Swift are a partial determination of the claims of the class as above defined in that these proceedings and these Findings of Fact and Conclusions of Law as to Swift are limited to those members of plaintiff class who were (a) terminated by Swift on or after November 29, 1969, and on or before December 27, 1969, and (b) were on date of termina-

tion on the "active payroll," and (c) completed 270 calendar days on the "payroll" between December 29, 1968, and the date of termination; the issues with respect to vacation pay entitlement of those members of the class who are not within the foregoing narrower class definition are reserved for later proceedings as may be appropriate.

5. Amalgamated was the exclusive representative of members of the plaintiff class with respect to their terms and conditions of employment while they were employed with Swift and with respect to any dispute or grievance arising out of that employment, including the vacation pay grievance, 69-22.

6. As the exclusive representative of plaintiff class, Amalgamated owed members of the class a duty of fair representation.

7. Amalgamated's processing of the meritorious vacation pay grievance was perfunctory in violation of the duty of fair representation owed by Amalgamated to plaintiff class.

8. Amalgamated participation in the settlement agreement whereby it withdrew the vacation pay grievance from the grievance procedures, including arbitration, violated the duty of fair representation that it owed to plaintiff class.

(a) The action of Amalgamated in withdrawing the grievance was arbitrary in violation of its duty fairly to represent plaintiff class.

(b) The action of Amalgamated in withdrawing the grievance discriminated against plaintiff class in violation of Amalgamated's duty fairly to represent plaintiff class.

(c) The action of Amalgamated in withdrawing the grievance was motivated by a hostile attitude toward plaintiff class in violation of its duty fairly to represent plaintiff class.

(d) The withdrawal of the grievance was effectuated by Amalgamated in bad faith and by action inconsistent with an honest effort by Amalgamated to discharge its duty fairly to represent plaintiff class.

9. The settlement agreement entered into by Amalgamated in violation of its duty of fair representation toward plaintiff class is null and void with respect to plaintiff class.

10. Plaintiff class may submit its claim for vacation pay, wrongfully withdrawn from the grievance procedures by Amalgamated, to this Court for a determination on the merits.

11. Swift's joint and active participation in the settlement agreement, knowing or having reason to know that Amalgamated could not enter into the settlement agreement consistently with its duty to represent plaintiff class fairly, was wrongful. The scope and amount of damages sustained by plaintiff class which are a proximate result of such wrongful conduct will be determined by further proceedings as may be appropriate.

12. Under the terms of the Master Agreement between Amalgamated and Swift, members of plaintiff class earned, and Swift is obligated to pay to them individually, vacation pay for 1970 vacation eligibility calculated in accordance with the formulas set forth in the Master Agreement applied as if such members of plaintiff class had been on the "active payroll" on December 18, 1969, to be determined through further proceedings as may be appropriate.

13. Amalgamated is liable to members of plaintiff class for such damages arising out of its breach of its duty to represent them fairly as may be later determined through further proceedings as may be appropriate.

October 17, 1975.

/s/ Earl R. Larson United States District Judge

FURTHER CONCLUSIONS OF LAW

No. 4-71-Civ. 602

The parties have submitted pretrial statements, participated in a pretrial conference, and fully briefed and argued the question of law remaining to be resolved. The Court makes the following additional

CONCLUSIONS OF LAW

14. Members of plaintiff class terminated on or after November 29, 1969, and meeting a credited service requirement are entitled to full vacation pay computed in accordance with Paragraph 35 of the Master Agreement.

15. Members of plaintiff class terminated before November 29, 1969, and meeting a credited service requirement are entitled to full vacation pay if termination was causally related to the closing or announced closing of the plant.

16. Any member of plaintiff class whose date of termination was such that he or she failed to satisfy one of the credited service requirements is entitled to pro rata vacation pay if termination was causally related to the closing or announced closing of the plant; provided, however, that this paragraph shall not apply to members of plaintiff class whose vacation eligibility would be determined by Paragraph 31 of the Master Agreement. The claims of these first-year employees will be resolved at a later date.

17. Members oof plaintiff class on the "benefit" (S & A) payroll on the date of termination are not entitled to vacation pay.

18. Members of plaintiff class who retired are not entitled to vacation pay. This includes:

(a) Members of plaintiff class who retired under normal retirement provisions at age 65 at any time during 1969, or who retired on January 1, 1970, or were scheduled to be retired on January 1, 1970;

(b) Members of plaintiff class who, between May 29, 1969, and December 27, 1969, inclusive, elected to retire early (prior to age 65);

(c) Members of plaintiff class who, between May 29, 1969, and December 27, 1969, inclusive, retired under disability retirement provisions.

19. Members of plaintiff class who died prior to December 28, 1969, are not entitled to vacation pay.

20. Potential class members who opted out are not members of the class and cannot withdraw their "opt outs."

21. The Notice to the Class, and the method of giving notice, satisfied due process.

22. Potential class members who did not receive the Notice to the Class and who did not opt out are members of the class and entitled to their appropriate damages. A list of such class members will be prepared at a later date.

23. Members of plaintiff class are entitled to prejudgment interest dating from January 1971.

24. Defendant Swift & Company is liable for prejudgment interest from January 1, 1971, through December 31, 1971, and the Union is liable for the prejudgment interest accruing thereafter.

25. Members of plaintiff class are entitled to an award of reasonable attorneys' fees and costs above and beyond the award of vacation pay.

26. The Union is liable for the payment of plaintiffs' attorneys' fees and costs.

27. Members of plaintiff class are not entitled to penalty pay under M.S.A. § 181.13.

28. Members of plaintiff class are not entitled to punitive or exemplary damages.

29. Defendant Swift & Company is responsible for the payment of vacation pay. The issue not having been properly joined, Swift & Company is not entitled at this time to have the Union pay the first $928,200. This conclusion, however, does not preclude or prejudice defendant Swift & Company's right to make a subsequent claim against the defendant Union for said $928,200.

30. The grievance filed by the Union on October 21, 1969, and dismissed on June 30, 1971, encompassed the vacation pay claims of those members of plaintiff class whom the Court has found entitled to vacation pay.

31. The statute of limitations was tolled on behalf of these class members during the pendency of the grievance and by the filing of this suit on November 26, 1971.

32. Assuming, without deciding, that the two-year statute of limitations (M.S.A. § 541.07(5) is applicable, no member of plaintiff class otherwise entitled to vacation pay is barred from recovery by that statute.

May 12, 1977.

/s/ Earl R. Larson United States District Judge

MEMORANDUM ORDER

No. 4-71-Civ. 602

Confusion has arisen concerning the interpretation of paragraph 18 of this Court's Further Conclusions of Law, dated May 12, 1977. Defendant Swift interprets subparagraph 18(b) to exclude from the class entitled to vacation pay those individuals who were involuntarily terminated on November 29, 1969, and who elected to take early retirement pursuant to the contract. Plaintiffs contend that 18(b) excludes only those individuals who left work before November 29, 1969, to go on retirement, and that paragraph 4 of this Court's Conclusions of Law, dated October 17, 1975, awarded vacation pay to all employees terminated on November 29 without regard to whether or not they later received early-age pension benefits.

In paragraph 4 this Court ruled that:

> those members of plaintiff class who were (a) terminated by Swift on or after November 29, 1969, and on or before December 27, 1969, and (b) were on date of termination on the "active payroll," and (c) completed 270 calendar days on the "payroll" between December 29, 1968, and the date of termination

are entitled to vacation pay. In paragraph 18, this Court further ruled that:

> "Members of plaintiff class who retired are not entitled to vacation pay. This includes ... (b) Members of plaintiff class, who between May 29, 1969, and December 27, 1969, inclusive, elected to retire early (prior to age 65)."

The dilemma arises because those individuals whose rights are presently at issue were, on the date of their termination, on the "active payroll" even though they elected to retire early.

It is clear that had there been no closing and had these individuals voluntarily retired on November 29, 1969, they

would have been entitled to no vacation pay for the work year 1969 because they would not have been on the active payroll on December 28, 1969. Similarly, since individuals who turned 65 in a given month were forced to retire on the first day of the following month, most such retires would receive no vacation for the year of their 65th birthday for the same reason. Of course, those with birthdays in December would not go on retirement until January 1 of the following year and would, therefore, be on the active payroll on December 28 of that year, but an express contractual provision excluded them from vacation benefits. Thus, the governing principle under the contract, though nowhere expressly stated, appears to have been that retirees receive no vacation pay for the final calendar year in which they work. Under this principle, those individuals who elected to accept early retirement (for example, retirement under the pension rights of Exhibit VIII, paragraph 1(c) forfeited their rights to vacation pay for the year of 1969.

Plaintiffs argue that the fact that Swift forced their involuntary retirement changes this analysis. Their position is unsupportable in view of the express treatment of plant closings in Exhibit VIII, Part F, under which these employees received eight weeks of separation pay. That provision clearly entitled only those who "are retired on pension" to the separation pay. Part F makes no mention of preservation of vacation rights. It is reasonable to infer that this separation pay, and not vacation pay, was intended as the bargained-for protection of those who had earned early retirement rights. To award vacation pay in addition to the payments already received would be to confer a windfall on these early retirees.[1]

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[1]The deferral of payment mechanism for the pension plan lends additional support to the view that these employees are not entitled to full vacation payments. Had these employees received, say, three weeks vacation pay for rights accrued in 1969, they would have received their first pension checks three weeks later than they actually did. Consequently, even if this Court were to conclude that the employees were entitled to vacation pay, Swift would be entitled to a set-off for the pension payments made in lieu of the vacation payments.

This is the conclusion expressed in paragraph 18(b) of the Further Conclusions of Law, but perhaps an amendment is in order to eliminate confusion.

IT IS ORDERED:

That paragraph 18(b) of the Further Conclusions of Law, dated May 12, 1977, be amended to read:

> "Members of plaintiff class who, between May 29, 1969, and December 27, 1969, inclusive, elected to retire early (prior to age 65), including those members who remained on the active payroll until November 29, 1969."

November 16, 1977.

/s/ Earl R. Larson United States Senior District Judge

FURTHER CONCLUSIONS OF LAW

No. 4-71-Civ. 602

The parties have submitted memoranda addressing the questions of law remaining to be resolved. The Court makes the following additional

CONCLUSION OF LAW

33. Members of plaintiff class who had not, by November 29, 1969, become eligible for their first vacation pursuant to Paragraph 31 of the Master Agreement are not entitled to vacation pay.

IT IS FURTHER ORDERED:

That the final sentence of paragraph 16 of Further Conclusions of Law, dated May 12, 1977, be stricken.

November 18, 1977.

/s/ Earl R. Larson United States Senior District Judge

FURTHER CONCLUSIONS OF LAW

No. 4-71-Civ. 602

The parties have submitted memoranda addressing the questions of law remaining to be resolved. The Court makes the following additional

CONCLUSIONS OF LAW

34. Each member of plaintiff class who is entitled to full vacation benefits shall be entitled to vacation pay in an amount

equal to the greater of the following two products: 2.2% x gross earnings x weeks of vacation due or 40 hours pay x weeks of vacation due; provided that "gross earnings" shall reflect work performed in the 1969 calendar year except as provided in paragraph 35(b) and (c) of the Master Agreement, that "weeks of vacation due" shall be determined in accordance with paragraph 33 of the Master Agreement, and that "40 hours pay" shall be computed pursuant to paragraph 35(d) of the Master Agreement.

35. Each member of plaintiff class who is entitled to pro rata vacation benefits shall be entitled to vacation pay in an amount equal to the greater of the following two products: 2.2% x gross earnings x weeks of vacation due or $\frac{\text{days of service}}{270}$ x 40 hours pay x weeks of vacation due; provided that "gross earnings" shall reflect work performed in the 1969 calendar year except as provided in paragraph 35(b) and (c) of the Master Agreement, that "weeks of vacation due" shall be determined in accordance with paragraph 33 of the Master Agreement, that "days of service" shall reflect days of credited service in the 1969 calendar year, and that "40 hours pay" shall be computed in accordance with paragraph 35(d) of the Master Agreement.

36. Evidence of vacation received or accrued in employment other than with defendant Swift in the period of time following each plaintiff's termination by Swift is irrelevant to the computation of vacation pay due in this proceeding. Each plaintiff's duty to mitigate damages has been taken into account in determining that members of plaintiff class who have failed to complete any of the contractual credited service requirements are entitled only to pro rata vacation pay.

37. Prejudgment interest shall be computed on the gross amount of each plaintiff's recovery without regard to any amounts scheduled to be withheld for taxes.

December 1, 1977.

/s/ Earl R. Larson United States Senior District Judge

FURTHER CONCLUSION OF LAW

No. 4-71 Civ. 602

The parties have addressed the questions of law remaining to be received. The Court makes the following additional

CONCLUSION OF LAW

38. Defendant Swift & Company shall withhold from the vacation pay damages (not from interest or attorney's fees) the following amounts for each person:

a. 20% for Federal Income tax

b. 6.05% for Social Security taxes (FICA)

c. Minnesota Income tax:

First	$ 500 at 1.6%
Next	500 at 2.2%
Next	1,000 at 3.5%
Next	1,000 at 5.8%
Next	1,000 at 7.3%

This withholding schedule is premised on the vacation pay being distributed to class members in 1978. If the vacation pay is not distributed in 1978, the level of withholding may have to be adjusted to reflect the then current federal and state re-

quirements. Within thirty (30) days after any payment to a class member, Swift & Company shall mail to the person an appropriate W-2 form.

February 22, 1978.

/s/ Earl R. Larson United States Senior District Judge

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER FOR JUDGMENT

No. 4-71-Civil 602

FINDINGS OF FACT

The Court reaffirms the Findings of Fact numbered 1 through 34 contained in the Findings of Fact and Conclusions of Law dated October 17, 1975, and filed October 17, 1975.

The Court makes the following additional Findings of Fact:

35. The members of plaintiff class set forth in the schedules identified as plaintiff's Exhibits 2 and 3, 4/10/78, copies of which are attached, terminated on or after November 29, 1969, and met a credited service requirement. The full vacation pay for each such member of plaintiff class has been computed and is set forth to the right of each name.

36. The members of plaintiff class set forth in the schedule identified as plaintiff's Exhibit 4, 4/10/78, a copy of which is attached, terminated before November 29, 1969, as a result of the closing or announced closing of the plant and met a credited service requirement. The full vacation pay for each

such member of plaintiff class has been computed and is set forth to the right of each name.

37. The members of plaintiff class set forth in the schedules identified as plaintiff's Exhibits 5 and 5A 4/10/78, copies of which are attached, terminated before November 29, 1969, as a result of the closing or announced closing of the plant but failed to satisfy one of the credited service requirements. The vacation pay for each such member of plaintiff class has been computed and is set forth to the right of each name.

38. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 1 4/10/78 were on the "benefit" (S & A) payroll on the date of termination.

39. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 2 4/10/78 retired under normal retirement provisions at age 65 at any time during 1969, retired January 1, 1970, or were scheduled to be retired on January 1, 1970.

40. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 3 4/10/78 between May 29, 1969, and December 27, 1969, inclusive, elected to retire early (prior to age 65).

41. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 4 4/10/78 between May 29, 1969, and December 27, 1969, inclusive, retired under disability retirement provisions.

42. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 5 4/10/78 died prior to December 26, 1969.

43. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 6 4/10/78 did not qualify for first year vacation.

44. The members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 7 4/10/78 terminated for reasons other than those related to the closing or announced closing of the plant.

45. The members of plaintiff class set forth in the schedule attached hereto identified as Exhibit 8 – Members of Plaintiff Class Who Opted Out of the Class, opted out of the class.

46. The presumed members of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 10 4/10/78 had notices duly mailed to them and failed to file a claim form or responded that they did not wish to make a claim.

47. The presumed member of plaintiff class set forth in the schedule attached hereto identified as Defendant Swift's Exhibit 11 4/10/78 went on the company-wide waiting list and transferred to a new plant rather than terminate his employment with Swift & Co.

CONCLUSIONS OF LAW

The Court reaffirms the Conclusions of Law numbered 1 through 13 contained in the Findings of Fact and Conclusions of Law dated October 17, 1975, and filed October 20, 1975.

The Court reaffirms the Further Conclusions of Law numbered 14 through 32 dated May 12, 1977, and filed May 12, 1977, except that by Order of November 18, 1977, the final sentence of paragraph 16 was ordered stricken.

By Order of November 16, 1977, paragraph 18(b) was amended to read:

> "Members of plaintiff class who, between May 29, 1969, and December 27, 1969, inclusive, elected to retire early (prior to age 65), including those members who remained on the active payroll until November 29, 1969."

The Court reaffirms Further Conclusion of Law Number 33 dated November 18, 1977, and filed November 18, 1977.

The Court reaffirms Further Conclusions of Law numbered 34 through 37 dated December 1, 1977, and filed December 1, 1977.

The Court reaffirms Further Conclusion of Law Number 38 dated February 22, 1978, and filed February 22, 1978.

The Court makes *Further Conclusions* of Law as follows:

39. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 2 4/10/78, consisting of one page, are entitled to judgment against Defendant Swift & Co. in the amount set forth opposite his or her name, together with interest thereon at the rate of 6% per annum for a period of one year; such judgments will be satisfied by payment, as to each of those members of plaintiff class, of the amount remaining after withholding taxes in accordance with Conclusion of Law No. 38.

40. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 2 4/10/78, consisting of 26 pages, and plaintiff's Exhibit 3 4/10/78 are entitled to judgment against Defendant Amalgamated Meat Cutters and Butcher Workmen of North America in the amount of the interest on the figure set forth opposite his or her name, at the rate of 6% per annum, from January 1, 1972 to the date of entry of judgment.

41. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 4 4/10/78, consisting of three pages, are entitled to judgment against Defendant Swift & Co. in the amount set forth opposite his or her name together with interest thereon at the rate of 6% per annum for a period of one year; such judgments will be satisfied by payment, as to each of those members of plaintiff class, of the amount remaining after withholding taxes in accordance with Conclusion of Law No. 38.

42. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 4 4/10/78, consisting of three pages, are entitled to judgment against Defendant Amalgamated Meat Cutters and Butcher Workmen of North America in the amount of the interest on the figure set forth opposite his or her name, at the rate of 6% per annum, from January 1, 1972, to the date of entry of judgment.

43. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 5 4/10/78, consisting of two pages, and plaintiff's Exhibit 5A 4/10/78, consisting of one page, are entitled to judgment against Defendant Swift & Co. in the amount set forth opposite his or her name, together with interest thereon at the rate of 6% per annum for a period of one year; such judgments will be satisfied by payment, as to each of those members of plaintiff class, of the amount remaining after withholding taxes in accordance with Conclusion of Law No. 38.

44. That those members of plaintiff class whose names are set forth in the schedule attached hereto identified as plaintiff's Exhibit 5 4/10/78, consisting of two pages, and plaintiff's Exhibit 5A 4/10/78, consisting of one page, are entitled to

judgment against Defendant Amalgamated Meat Cutters and Butcher Workmen of North America in the amount of the interest on the figure set forth opposite his or her name, at the rate of 6% per annum, from January 1, 1972, to the date of entry of judgment.

45. Defendant Swift & Co. and Defendant Amalgamated Meat Cutters and Butcher Workmen of North America are entitled to judgment in their favor, on the merits, against those members of plaintiff class whose names are set forth in the schedules attached hereto and identified as follows:

Defendant Swift & Co.'s Exhibit 1 4/10/78, consisting of one page (S & A);

Defendant Swift & Co.'s Exhibit 2 4/10/78, consisting of one page (Normal Retirees);

Defendant Swift & Co.'s Exhibit 3 4/10/78, consisting of four pages (Early Retirees);

Defendant Swift & Co.'s Exhibit 4 4/10/78, consisting of one page (Disability Retirees):

Defendant Swift & Co.'s Exhibit 5 4/10/78, consisting of one page (Died during 1969);

Defendant Swift & Co.'s Exhibit 6 4/10/78, consisting of one page (Did Not Qualify For First Year Vacation);

Defendant Swift & Co.'s Exhibit 7 4/10/78, consisting of one page (Early Terminees whose termination is not causally related);

Defendant Swift & Co.'s Exhibit 10 4/10/78, consisting of one page (Presumed members of plaintiff class to whom notices were duly mailed and failed to file a claim form or responded that they did not wish to make a claim);

Defendant Swift & Co.'s Exhibit 11 4/10/78, consisting of one page (Presumed member of plaintiff class who went on the company wide waiting list and transferred to a new plant rather than terminate his employment with Swift & Co.).

46. Plaintiffs Charles N. Buchholtz and Lester J. Tauer are entitled to attorneys' fees and costs in the amount of $287,004.97, for the reasons set forth in a separate memorandum filed herewith.

47. Post-judgment interest is to be computed on the basis of the entire judgment, including pre-judgment interest. *See e.g. Illinois Central R. Co. v. Texas Eastern Trans. Corp.*, 551 F.2d 943 (5th Cir. 1977).

48. Post-judgment interest is to be computed also on the award of attorneys' fees under 28 U.S.C. § 1961 (1970) because the attorneys' fees are not awarded as costs of suit but as part of plaintiffs' damages cause by defendant Amalgamated's breach of its duty of fair representation.

LET JUDGMENT BE ENTERED AS FOLLOWS:

IT IS ORDERED AND ADJUDGED that class plaintiffs have and recover from defendant Swift & Co. on behalf of those members of plaintiff class whose names are set forth in plaintiff's Exhibits 2, 3, 4, 5, and 5-A of April 10, 1978, copies of which are attached hereto, the sum of $574,349.27 plus interest from January 1, 1971, to December 31, 1971, in the amount of $34,460.96, with interest on the total of these amounts, $608,810.23, at the rate of 6% per annum from the date hereof, until paid; and

IT IS ORDERED AND ADJUDGED that class plaintiffs have and recover from defendant Amalgamated Meat Cutters and Butcher Workmen of North America, on behalf of those

members of plaintiff class whose names are set forth in plaintiffs' Exhibits 2, 3, 4, 5, and 5-A of April 10, 1978, the sum of the total of the following amounts:

(a) Interest on $574,349.27 at the rate of 6% per annum from January 1, 1972, to the date hereof, in the amount of $224,515.45.

(b) Plaintiffs' attorneys; fees and costs, as allowed by the Court, in the amount of $287,004.97,

with interest on the total of the above two amounts at the rate of 6% per annum from the date hereof, until paid; and

IT IS ORDERED AND ADJUDGED that defendants Swift & Co. and Amalgamated Meat Cutters and Butcher Workmen of North America have judgments in their favor, on the merits, and against the class plaintiffs as to those members of plaintiff class whose names are set forth in defendant Swift's Exhibits 1, 2, 3, 4, 5, 6, 7, 10, and 11 of April 10, 1978, copies of which are attached hereto.

IT IS FURTHER ORDERED AND ADJUDGED that the Court retains jurisdiction herein to the extent necessary to supervise the administration of this judgment and of any further duties of the named class plaintiffs.

July 7, 1978.

/s/ Earl R. Larson United States Senior District Judge

[Plaintiff's Exhibits 2, 3, 4, 5, and 5A referred to in the District Court's Further Conclusions of Law, Paragraphs 39, 40, 41, 42 and 43 above, list the names of 722 members of plaintiff class and the amount of vacation pay awarded to each such person. Defendant Swift & Co.'s Exhibits 1, 2, 3, 4, 5, 6, 7, 10, and 11 referred to in the District Court's Further Conclusions of Law, Paragraph 45 above, list the names of 587 members of plaintiff class who were not awarded vacation pay. These lists of names total 48 pages. Petitioners believe that it is unnecessary in considering the questions presented to extend this Appendix by printing these lists of names and amounts.]

ARBITRATION

WILSON & CO., INC.

and

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO LOCAL NO. 270

Memphis Plant Shutdown

Grievances A, B and C

These grievances were heard at Chicago, Illinois, at the Morrison Hotel, December 27, 1962, and at the Palmer House, January 8, 1963, by the following:

Board of Arbitration:
John Day Larkin, Chairman
Mr. H. R. Swanson, Company Designated Member
Charles Fischer, Union Designated Member

Appearances:
On behalf of the Union:
Mr. Eugene Cotton, Attorney
Mr. Ralph Holstein, President, UPWA
Mr. Jesse Prosten
Mr. Calvin Kincaid, President of Local 270

On behalf of the Company:
Mr. Lee Bishop, Attorney
Mr. Claire Croker
Mr. Ed Tuite
Mr. James Enrietto

The parties filed post-hearing briefs and the record was closed January 17, 1963.

Facts Pertinent to the Three Grievances

On September 12, 1962, the Company gave notice, in accordance with Section 135 of the Agreement, of its intention to close the Memphis plant. No specific date was given in the notice, but the termination of all operations in Memphis took place on December 15, 1962. The language of the Agreement which provides for such notice follows:

"Notice of Plant or Department Closing

"135. The company will give notice of the closing of a plant or division of a plant or a major department of a plant at least ninety (90) calendar days prior to such closing. Where an employee who was on the active payroll or benefit payroll of the plant on the date of the notice or at any time thereafter (excluding temporary replacements and newly-hired employees) is permanently separated from the service as a result of such closing prior to the expiration of ninety (90) days from the date of the notice, then for each day (based on a five-day work week) after his separation which is within the ninety (90) day period and which is not within a week for which a weekly guarantee is paid, the company will pay eight (8) hours at the employee's regular rate of pay."

Additional facts specifically related to each grievance will be given as these are considered separately.

Grievance A

"Wilson & Co. claim it has no obligation to pay vacations to all employees who, as of January 1, 1963, have completed 30 or more weeks of active employment in the previous 12 months.

"The Union claims that because of the extraordinary circumstance developing out of the closedown of the Memphis Plant that the Company's failure to recognize this obligation constitutes a violation of the Master Agreement between the parties, and demands vacation pay for all such eligible employees."

Pertinent Vacation Provisions of the Agreement

"Vacations

"69. In any calendar year, regular full-time employees (not including casual and part-time employees) shall receive a vacation with pay provided they have the required service as specified in (a) below and further that they qualify by having the required actual working service as provided in (b) below:

"(a)

Amount of Vacation	Service Requirements
One Week	One (1) year and less than three (3) years of continuous service.
Two Weeks	Three (3 years and less than ten (10) years of continuous service.
Three Weeks	Ten (10) years and less than twenty (20) years of continuous service.
Four Weeks	Twenty (20) years or more of continuous service.

" 'Continuous Service' is defined as one (1) year of service for each anniversary year (anniversary date to anniversary date) in which the employee has at least thirty

(30) weeks of actual working service. The loss of a year of 'Continuous Service' in accordance with the foregoing definition does not affect any prior accrued vacation service. A new employee will be eligible for his first vacation when he has met the later of (1) one (1) year of continuous service as defined herein, or (2) the end of the week in which he has completed thirty (30) weeks of actual working service. The date so established shall become the individual's vacation anniversary date for all vacation purposes thereafter.

"(b) For subsequent vacations an employee must have at least thirty (30) weeks of actual working service in the twelve (12) months immediately preceding the date the employee's requested vacation would start.

70. All vacations must be taken during the current calendar year. Vacations are not cumulative or retroactive. Employees entitled to vacations will not be allowed to take money in lieu thereof, except as provided in paragraphs 74, 75, 76 and 79.

* * *

"74. Employees who are laid off and who qualify for a vacation shall be given vacation pay at the time of layoff. This will not apply when an employee is laid off and immediately rehired in another department.

"75. Employees who resign and who qualify for a vacation shall receive the vacation to which they are entitled upon request of such employee.

"76. Employees who are discharged for cause and who qualify for a vacation at the time of discharge, shall be entitled to receive their vacation pay except in cases where the discharge was for stealing.

"79. Vacation pay will be granted persons leaving the employ of the company to enter the Armed Forces who have fulfilled all the contractual requirements for a vacation save the completion of one (1) year's service in the company's employ."

The Union's Position

The Union interprets Paragraph 69 as requiring vacation pay for all employees meeting two major requirements: First, there must be one or more years of continuous service. Second, there must be thirty weeks of actual working service in the twelve months immediately preceding the date the employee's requested vacation would start.

It is not disputed that had the Company continued operating the Memphis plant into January, of 1963, and they started to effectuate the permanent layoffs incidental to the plant shutdown, every employee who had at least thirty weeks of continuous service in the twelve months preceding his anniversary date would have been entitled to vacation pay based on the service rendered during those months. Thus, the Company, in electing to close the plant two weeks before the end of the calendar year 1962, is attempting to evade this vacation obligation completely and wipe out all vacation rights earned during 1962.

The Union further stresses the point that vacation rights are not mere employer gratuities, but are earned benefits accruing as a result of service performed during a specific period. This concept is one which has become quite well accepted in American jurisprudence. In bankruptcy law the vacation is viewed as a financial right, earned month by month, so that an accrued vacation benefit, within the last three months prior to bankruptcy, is included under priority rights accruing to "wages earned" during the last three months before bankruptcy. *Solmeyer v. Southern California Pipe Trades Trust Fund*, 301 F

(2d) 763, U. S. Court of Appeals, 9th Circuit, 1962; *U. S. v. Munro-Van Helms Company*, 243 F 2d 10, U. S. Court of Appeals, 5th Circuit, 1957. In the *Munro-Van Helms* case, the vacation was to be paid to each employee who "is in the employ of the Company on July 1st."

The Union also cites the following arbitration awards as giving the same recognition of vacation pay as a benefit earned by reason of the services rendered during a qualifying period: *Troy Laundry & Dry Cleaning Co.*, 61-2 ARB Par. 8337; and *International Mineral & Chemical Corp.*, 62-1 ARB Par. 8062.

The Company's Contention

The Company takes the position that any reasonable interpretation of the vacation provisions of the parties' Agreement requires that an individual must be a regular, full-time employee during the calendar year of his vacation to qualify for vacation pay. Admittedly, had the plant continued in operation into January, 1963, all regular employees who had met the "working service" requirements of the previous twelve months immediately preceding the date of the employees' requested vacation, as specified in 69(b), would qualify for vacations. However, it was within the Company's contractual right to elect to close the plant before January, 1963, in order to avoid the added financial obligation of vacation pay in 1963, the Company insists.

The language of Section 69(a) begins with these words: "In any calendar year, any *full-time* employees . . . shall receive a vacation with pay ..." (emphasis added). For twenty years, it is claimed, this has been accepted by the parties to mean only one thing and that is to qualify for any vacation in any calendar year, one must be a regular, full-time employee during that "calendar" year. This is an established custom and past practice which cannot be ignored. During this period the Company

has closed at least four of its plants. At none of these has the Company paid for vacations subsequent to the closing of the plants and the Union has never before made an issue of it; not even when the Los Angeles plant was closed only a month before the closing of the Memphis plant.

Conclusion

The Arbitrator is on record in a number of cases in support of claims for vacation pay by employees no longer in the service of the companies which had previously employed them. At least two of these cases have been reported (*Campbell Soup Co.*, 28 LA 214; and *International Mineral & Chemical Corp.*, 62-1 ARB 8062). In each case there has been different contract language, different facts and circumstances in the particular situation; and past practice has varied widely. The case now before this Board also presents a singular set of facts, past practices and contract language, which must be considered.

The Company is persuasive in its undisputed statement that the Union has not previously raised this issue, even though it has closed certain other plants since the adoption of the language found in Section 69. However, except for the closing of the Los Angeles plant in November, 1962, we have little information as to what the accumulated vacation rights might have been in the earlier cases. Here, it seems quite obvious that, as the Union points out, the time selected for closing the plant was designed to deprive the employees of their earned vacation rights.

Even though the Company makes much of the fact that it has only given vacations to those who are regular, full-time employees in "any calendar year," there are certain notable exceptions provided in the Agreement: "Employees entitled to vacations will not be allowed to take money in lieu thereof, except as provided in paragraphs 74, 75, 76 and 79." (See

Paragraph 70.) A casual reading of these four paragraphs quoted above shows that it was the intention of the parties to provide cash payment for earned vacation time to those not currently on the payroll during the calendar year because (a) they have been laid off and not immediately rehired in another department; (b) they resigned after establishing qualification by having the appropriate "continuous service"; (c) they were discharged for cause (other than stealing) after qualifying; or (d) they were inducted into the Armed Forces. This indicates to us the intention of the parties to provide cash payments for those who have earned vacations during the preceding year, but for reasons beyond their control, they are not working for this Company in the calendar year when vacations are due them.

To be more specific, the employees who were laid off at the Memphis plant "and not immediately rehired in another department," and who had met the qualifications for a 1963 vacation by virtue of their continuous service, are as much entitled to vacation pay as any other laid off employee in any other plant under Paragraph 74 of this Master Agreement. This language makes no distinction between those on temporary layoff and those permanently laid off. Nor does it make any exceptions for those who are to receive severance pay under an entirely different provision of the Agreement.

Under Paragraph 9 of the Agreement, it is clear that the Company has reserved the "right to relieve employees from duty because of lack of work," to determine which plants to operate and which to close and when to close them; but this Management provision is "not to be used for the purpose of discrimination against any employee *or to avoid any other provision of this Agreement*" (emphasis added).

In arbitration decisions, it is now well recognized that vacation pay is a part of the earnings which accrue to an employee as he serves the employer over a stipulated period of time.

Even though Paragraph 69 provides for vacations to be taken in "any calendar year" by "regular full-time employees," this paragraph is distinctly qualified by subsequent Paragraphs 70, 74, 75, 76, 79 and others. Any reasonable interpretation of Paragraph 74 certainly includes the employees who were laid off in Memphis after they had met the continuous service requirements in 1962. Those should receive vacation pay. It matters not that they were permanently rather than temporarily laid off; those who have qualified should receive the vacation pay which they have earned.

Award

All employees who were laid off in anticipation of the closing of the Memphis plant, and who qualify for a vacation by reason of continuous service with Wilson & Co., shall be paid vacation pay in accordance with their vacation time earned in 1962, as provided in Paragraph 69.

/s/ John Day Larkin,
Chairman

Charles Fischer

H. R. Swenson

Supreme Court, U.S.
FILED
DEC 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-746

CHARLES N. BUCHHOLTZ AND LESTER J. TAUER,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

SWIFT & COMPANY AND AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-746

CHARLES N. BUCHHOLTZ AND LESTER J. TAUER,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

SWIFT & COMPANY AND AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent Swift & Company opposes the Petition for Writ of Certiorari. The opinions below, Statement of Jurisdiction and statutory provisions involved are correctly stated by petitioners.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should second guess the advice of Amalgamated's attorneys—that the vacation pay grievance would be lost in arbitration and Amalgamated's decision to heed that advice and settle the grievance on the best terms it could negotiate—and find Amalgamated guilty of unfair representation.

2. Assuming that Amalgamated breached its duty of fair representation and that Swift did not breach the collective bargaining agreement, whether Amalgamated should be required to pay the petitioners' attorneys fees and costs in their unsuccessful attempt to prove a breach of the bargaining agreement.

3. Whether general principles of contract law require Swift to pay 1970 vacation pay to the petitioners when under the plain language of the collective bargaining agreement, its bargaining history and past practice the petitioners are not entitled to it.

4. Whether this Court by case law should retroactively establish a new standard of appellate review unique to unfair representation cases.

COUNTERSTATEMENT OF THE CASE

The petitioners' statement of the case is argumentative and omits essential facts including the pertinent contract language. Because this suit, largely involves disputes about conclusions to be drawn from the facts a more detailed statement is needed. The facts stated in petitioners' brief will not be repeated except to the extent necessary to make a coherent statement.

In November of 1969 Swift & Company closed most of its South St. Paul, Minnesota meat packing plant. The Amalgamated Meat Cutters and Butcher Workmen of North America (hereinafter Amalgamated or the Union) filed a grievance for benefits allegedly lost as a result of the closing including the vacation pay they would have received in 1970 if the plant had remained open. The collective bargaining agreement (Master Agreement) between Amalgamated and Swift provided a five-step grievance procedure culminating in arbitration. Swift adamantly rejected the vacation pay claim because the employees had not qualified under the Master Agreement.

The Master Agreement provided an employee was entitled to vacation pay:

> On December 28, provided that during the preceding 365 calendar days he has completed 270 calendar days on the payroll and provided that on said December 28 he is being carried on the active payroll;
> Vol. V 2336.[1]

The petitioners did not qualify for 1970 vacation pay because they were not on the active payroll on or after December 28, 1969.

BARGAINING HISTORY AND CLOSING BENEFITS

Every two to three years between 1948 and 1967 the Master Agreement between Amalgamated and Swift was renegotiated. Every Agreement since 1948 provided that an employee only qualified for a vacation by working a specified number of days and by being on the active payroll on a specified date. Vol. IV 2862-2904. During virtually every bargaining session the Union negotiated without success to eliminate the qualifying date and to substitute a pro rata vacation provision. The petitioners were aware of these attempts, participated in them and knew they were unsuccessful. Vol. III 1077-78. During 1967 contract negotiations the Union demanded "that the requirement in Para. 32 of being on the payroll on December 28 be deleted." Vol. I 85. The Union was unsuccessful.

Union and Swift officials testified that demands for pro rata vacation pay included employees severed as a result of plant closings. The Union's legal counsel, Mr. Irving King, who attended numerous collective bargaining negotiation sessions testified:

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[1]The district court record in the court of appeals consisted of Volumes I through VI and will be referred to in this manner. Reference to the printed appendix to the Petition for Certiorari will be by the abbreviation "App." followed by the page number.

> [T]his was a period of time in which the Union was negotiating a whole package of provisions for protection of employees in the event of plant close-downs as the matters I've mentioned, including inter-plant transfer, moving allowance, notice of closing and those matters, and it was in this context that these vacation pay changes were proposed also. Vol. IV 1785.

During Master Agreement negotiations in the 1950's and 1960's, Amalgamated was well aware of the problems caused by plant closings and constantly negotiated for improved closing benefits including pro rata vacations. Vol. IV 1750-53. Although it was not successful in obtaining pro rata vacations, Amalgamated did obtain many other concessions from Swift and, as a result, employees terminated when the South St. Paul plant closed received the following Master Agreement benefits:

1. The right to transfer to another plant — 190 employees took advantage of this right and transferred.

2. The opportunity to be placed on Company-wide waiting lists for job openings at new plants — 65 employees placed their names on the waiting list.

3. The right to a pension — 370 employees went on pension.

4. The right to substantial separation allowance — 561 employees received a total of $3,866,476.20 in separation allowances.

5. The right to 26 weeks advance notice of plant closings—although Swift wanted to close the plant on May 29, 1969, as a result of this requirement 1,500 employees received an additional 26 weeks of work and 26 weeks of pay.

6. The right to an eight-week gratuity payment—370 employees received a total of $489,264.95 in eight week gratuity payments.

Vol. VI 2772-73, Vol. I 78.

Termination benefits for the South St. Paul employees totaled $4,606,901.91. Vol. VI 2772. These benefits were part of the quid pro quo for the employees' last year of work. Pro rata vacations were not. The court of appeals noted, "This is a clear indication that the negotiators were aware of the many monetary consequences of closing the plant, but did not agree on an exception to the requirement of being on the payroll on December 28 for vacation pay purposes." App. A-21. If the plaintiffs now receive vacation pay, they will receive benefits they could not obtain at the bargaining table.

PAST PRACTICE

Between 1949 and 1969 Swift closed more than thirty-five meat packing plants throughout the United States under circumstances similar to those in South St. Paul. In each instance Swift, acting in accordance with the Master Agreement, did not pay vacation benefits for the subsequent year to employees who were not on the active payroll on the qualifying date. Vol. VI 2749. Similarly, thousands of employees who terminated for reasons unrelated to closings did not receive vacation pay if they were not on the active payroll on the qualifying date. Vol. VI 2755.

In flagrant disregard of Rule 408 of the Federal Rules of Evidence, which provides that settlements are not admissible, the district court received, over objection, the settlement of an unrelated vacation pay dispute resulting from Swift's closing a plant in Sioux City, Iowa.[2] It was on this unique settlement

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[2]Because of the proximity of Sioux City to Omaha, employees threatened to transfer en masse for one week to collect vacation pay. Although the Omaha plant was open and operating, its employees had also been given a six-month closing notice. The Master Agreement provided in effect that once such a notice was given, Swift could not lay off any employees. Swift was faced with a double work force at Omaha if the Sioux City employees transferred. Because of the unique situation Swift agreed to a settlement awarding vacation pay to certain employees. Vol. IV 1677-79.

agreement that the district court premised its interpretation of the contract. Vol. V. 2379. In addition to the prohibition of Rule 408, the Agreement itself provided it would not and could not be construed as a precedent. The court of appeals noted, "In view of that express language, applicable to both union and company, and in view of the special circumstances involving a short distance to travel and only one week of duty required, we are unwilling to consider it at all in interpreting the collective bargaining agreement between them." App. A-16 n.9.

EVALUATION OF THE GRIEVANCE'S MERITS

Every Union official connected with processing the grievance concluded long before settlement was discussed that the vacation pay grievance would not be won in arbitration. This included local union officials and Amalgamated officials in the Minneapolis office and at Amalgamated headquarters in Chicago. The named class representatives admitted this assessment was reasonable. Tauer testified that it was not unreasonable for the Union to consider the grievance a loser and Buchholtz testified, "[I]t [was] worth a shot in the dark, as I see it. . . ." Vol. IV 1601-02.

Eugene Cotton and Irving M. King, the two principal Amalgamated attorneys, also concluded the vacation pay grievance would be lost in arbitration. Vol. IV 1759-60, 1904. Before settlement discussions had commenced Mr. King explained the basis of this opinion to the Amalgamated official in charge of the grievance:

> The reasons for the opinion were principally that — and these are the reasons I told him — there had been this prior bargaining history in which the Union had been attempting, year after year, to have the contract changed in order to allow vacations in these circumstances. I told him that the contract with Swift & Company is unique in the packinghouse industry in that it requires that a person be on the active payroll on a certain date in order to receive vacations. I told him that there was no other major contract in the packinghouse industry in which this was a requirement. I mentioned specifically the Armour contract and the Wilson contract, and I told him that I had not ever seen a case with — an arbitration decision with a contract identical to this one that had ever been won by a Union.
>
> For these various reasons, I expressed the view that I thought it extremely unlikely that we could win this case and I did not think the grievance had merit. Vol. IV 1759-60.

The opinions of these attorneys were based on years of experience in labor law including the arbitration of over 400 grievances.

THE SETTLEMENT

With this evaluation in the background Amalgamated and Swift settled the vacation pay grievance a production incentive grievance and two seniority grievances arising out of the South St. Paul plant closing.[3] The members of the grievance committee who negotiated the settlement did not personally benefit. The settlement provided for withdrawal of the grievances, forfeiture of separation pay by employees receiving benefits under the settlement and the payment of pension-like benefits to employees who had thirty years or more of service but had not yet reached retirement age. Vol. VI 2472-77. The plight of those employees had been of utmost concern to Swift and the Union. Vol. III 1209. On other occasions, special arrangements had also been made to secure special pension benefits for people in closings. Vol. IV 1668-71.

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[3]The petitioners were not even potential beneficiaries of the production incentive and seniority grievances. The production incentive grievance had a potential value of $200,000. Vol. IV 1653.

Out of a work force of approximately 250 remaining employees, 67 were eligible for pension benefits as a result of the settlement. Vol. I 48-51. Forty-four accepted the pension benefits and in return gave up their separation pay. Vol. I 42-3, Vol. IV 1660.

Although the district court adopted a Finding, written by the petitioners, that the settlement cost Swift $928,000.00, the Finding was unsupported. Vol. 1 150. Mr. Tagg, a Swift employee who helped negotiate the settlement, testified the settlement cost Swift little or nothing. His calculation took into consideration that employees would be giving up substantial amounts of separation pay and that most of the cost would be paid by an independent pension fund rather than out of Swift's profits. Tagg was not concerned with the cost to the pension fund. Vol. III 1223-25, Vol. IV 658-59, 1702-09.

PROCEEDINGS BELOW

On October 20, 1975, the district court filed Findings of Fact and Conclusions of Law on the general liability issues in favor of the petitioners. Vol. I. 124. The district court erased from the contract the December 28th qualification date, thereby accomplishing what the Union had unsuccessfully tried to do at the bargaining table for over 20 years! The court adopted virtually without change the Findings of Fact and Conclusions of Law written and submitted to the court by petitioners' counsel months before trial.[4]

[4] During oral argument the court of appeals criticized this practice. Such "mechanically adopted" Findings have also been criticized by other circuit courts and this Court because they are not the product of the district judge's mind and "do not reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 615 n. 13, (1974); *In Re Telemart Enterprises, Inc.*, 524 F.2d 761 (9th Cir. 1975); *Kelson* v. *United States*, 503 F.2d 1291 (10th Cir. 1974); *In Re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747 (3rd Cir. 1965).

The district court made and entered its own additional Findings of Fact and Conclusions of Law on May 12, 1977, November 18, 1977, December 1, 1977, February 28, 1978 and July 7, 1978. Vol. I 162, 168, 290, 296, 306. These subsequent Findings were, in several instances, in direct conflict with the initial Findings adopted by the court but written by petitioners' counsel. The district court did not write a memorandum or opinion explaining its decision.

The court of appeals, reversing the judgment of the district court, held that Swift did not breach the collective bargaining agreement in refusing to pay the petitioners' 1970 vacation pay and that Amalgamated did not breach its duty of fair representation in settling the vacation pay grievance. App. A5-23.

REASONS FOR DENYING THE WRIT

I.

The Unfair Representation Issue Was Properly Decided Below By Applying The Decisions Of This Court To Disputed Factual Conclusions.

Petitioners theorize the court of appeals overlooked the district court's Findings of Amalgamated's alleged bad faith, hostility, discrimination, political favoritism and all sorts of other wrongs. Petitioners' Brief for Certiorari at 18. The appeals court, however, carefully reviewed the 3,000 page record below and determined the Findings were unsupported. App. A22-23. The district court Findings were written by the petitioners with a shotgun before the trial had even begun. Further review of these Findings would have no precedent value.

Petitioners plead that the court of appeals misapprehended the basis of the district court's Finding of bad faith when it concluded that the cornerstone of the Finding was the district court's legal conclusion that the grievance was meritorious. Petitioners argue that since the district court's finding of unfair representation ostensibly applied even to the subclasses for which the court found no breach of contract, the alleged breach could not have been the cornerstone of the bad faith Finding. The generalized Finding of unfair representation was adopted by the district court long before it ruled that certain subclasses were not entitled to vacation pay. From the bench the district court explained in its own words the "cornerstone" of its decision:

> I think the basis for the direction to the Union is that arbitration, which was provided for and requested, should have been held and none of us would have been here for another four or five years, possibly . . . .

* * * *

> . . . This is not a petty grievance. [the vacation pay claim] I agree the Union can't be required to go through an arbitration procedure on every petty grievance but this is a substantial matter. Vol. II 541-42.

In addition to concluding that the district court's decision on the merits of the grievance was the cornerstone of its bad faith Finding, the court of appeals found generally "no clear showing had been made of bad faith. . . . " App. A-22.

Petitioners contend the court of appeals' decision "rendered the 'arbitrary' conduct standard of unfair representation meaningless" because it was arbitrary to settle the vacation pay grievance and several other grievances in return for pension benefits. Petitioners' Brief for Certiorari at 12. The American Heritage Dictionary of the English Language (1973) defines "arbitrary" as "determined by whim or caprice." Amalgamated was not acting whimsically or capriciously when it heeded the advice of its experienced labor lawyers that the grievance would be lost in arbitration. On the contrary, it would have been arbitrary for Amalgamated to push forward, ignoring a beneficial settlement, after concluding it could not win. The reasonableness of Amalgamated's evaluation of the grievance is underscored by the appeals court's decision that there was no breach of contract. It would be bizarre indeed if Amalgamated were judged irrational or arbitrary for coming to the same conclusion as the court of appeals.

Even if this Court were to find a breach of contract, that decision would not detract from the good faith reasoned nature of Amalgamated's decision, and it would be improper to second guess that decison. In *Vaca* v. *Sipes,* 386 U.S. 171, 192-3 (1967) this Court held:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or

> jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

This position was emphasized in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge,* 403 U.S. 274, 301 (1971):

> [T]he doctrine . . . [of breach of duty of fair represention] carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . . . [T]he very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct [in allegedly misconstruing a contract], on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.

The record is devoid of any evidence that Amalgamated acted out of hostility or irrationally.

The petitioners' analogy of a union settling competing claims to an attorney settling the claim of one client in return for benefits to another client is nonsensical. While an attorney would breach the Code of Professional Responsibility in representing conflicting interests, a union is charged with doing just that. This Court and several courts of appeal have approved similar settlements in which the disputed claim of one group is settled in return for benefits to another group. *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953); *Corcoran* v. *Allied Supermarkets, Inc.,* 498 F.2d 527 (8th Cir. 1974); *Simberlund* v. *Long Island Rail Road Co.,* 421 F.2d 1219 (2nd Cir. 1970); *Cunningham* v. *Erie Railroad Co.,* 266 F.2d 411 (2nd Cir. 1959).

Amalgamated's judgment that the settlement was the very best it could negotiate should not be second guessed. Although petitioners claim a different settlement would have been better, Swift would not have agreed to anything else. The settlement was agreeable to Swift because of several unique features: (1) it involved withdrawal of *all four* grievances not just the vacation pay grievance, (2) Swift was sympathetic to the plight of employees who fell just short of qualifying for a pension and (3) for the most part the cost of the settlement came out of a pension fund and not out of profits.

II.

Petitioners' Damage Claim Against Amalgamated

For the first time in its motion for a rehearing in the Eighth Circuit, petitioners' attorneys demanded that Amalgamated pay them attorneys' fees even if there was no breach of contract because Amalgamated was still guilty of unfair representation. Since the claim is not against Swift, a response is not necessary.

III.

Interpretation of the Vacation Pay Provision of the 1967—1970 Collective Bargaining Agreement Between Swift and Amalgamated Has No Precedent Value

Procedurally the contract issue is hopelessly entangled with the unfair representation issues. Unless this Court grants certiorari on the unfair representation issue and reverses the decision below, the vacation pay settlement is unreviewable. *Vaca* v. *Sipes, supra.* Petitioners argue certiorari should be granted on the vacation pay issue because the court of appeals was wrong, and because there is a split of authority between two circuits.

The court of appeals decision was correct. It was based upon the plain language of the contract, supporting bargaining history and past practice. The parties were well aware of the

monetary consequences of plant closings and did not make an exception to the vacation qualifying date for closings. The appeals court's reasoning is supported by decisions of other circuits, state courts and arbitrators. *Local Lodge 2040, International Association of Machinists* v. *Servel, Inc.*, 268 F.2d 692 (7th Cir. 1959); *Division of Labor Law Enforcement* v. *Standard Coil Prod. Co., Inc.*, 136 Cal. App.2d Supp. 991, 288 P.2d 637 (1955); *Division of Labor Law Enforcement* v. *Mayfair Markets,* 102 Cal. App. 2d Supp. 943, 227 P.2d 463 (1951); *Givhan* v. *Federated Metals Division, American Smelting & Refining Co.*, 364 Mich. 370, 110 N.W.2d 763 (1961); *Treloar* v. *Steggeman,* 333 Mich. 166, 52 N.W.2d 647 (1952); *Tynan* v. *KSTP,* 247 Minn. 168, 77 N.W.2d 200 (1956); *Brackett* v. *Easton Boot & Shoe Co.*, 399 S.W.2d 842 (Mo. 1965); *Briggs* v. *Electric Auto-Lite Co.*, 37 Wisc. 2d 275, 155 N.W.2d 32 (1967); *International Union* v. *L. T. Patterson Co.*, 8 Ohio 2d 334, 159 N.E.2d 923 (1956); *Wagner Electric Corp.*, 54 Lab. Arb. 232 (1970) (Erps, Arb.); *Barg and Foster, Inc.*, 53 Lab. Arb. 692 (1969) (Seitz, Arb.); *Ecko Prod. Co.*, 54 Lab. Arb. 66 (1969) (Kabaker, Arb.); *Cricket Shop of Cedarhurst,* 49 Lab. Arb. 895 (1967) (Singer, Arb.); *Whittet-Higgins, Co.*, 15 Lab. Arb. 13 (1949) (Healey, Arb.)

Resolution of the vacation pay question has no precedent value. The reason for this is summarized in the Eighth Circuit's opinion. "Our job is to ascertain as authoritatively and as accurately as possible the intent of these private parties in the agreement." App. A-17. The court examined the contract and the pertinent past practice and bargaining history. From this examination the court concluded that petitioners were not entitled to 1970 vacation pay because that was not the parties' intent. This examination and its outcome does not involve important, novel or doubtful questions of law. It is extremely unlikely that a similar contract exists. There was testimony during trial that the contract was unique in the packinghouse industry. The Swift Master Agreement was rewritten in 1973 eliminating the disputed provision. Vol. VI 2919.

Based upon certain Sixth Circuit cases the petitioners argue certiorari should be granted because there is allegedly a split between circuits. In none of the Sixth Circuit cases awarding vacation pay was there a contractual requirement of being on the active payroll on a certain day. In *Local 186, United Packinghouse Food & Allied Workers* v. *Armour & Co.,* 446 F.2d 610 (6th Cir. 1971), cited by petitioners, the company petitioned for certiorari claiming a split between circuits based upon the Seventh Circuit decision in *Local 2040,* v. *Servel, supra.* The *Servel* decision held that employees were not entitled to vacation pay for the year following a plant closing. The results were different not because the circuits were at logerheads but because the contracts were different and accordingly certiorari was denied in *Armour.* 405 U.S. 955 (1972). As the *Armour* court noted, "[H]ad . . . [the parties] desired to alter the case law, they should have done so by explicit language." 446 F.2d at 618. In *Smith* v. *Kingsport Press, Inc.,* 366 F.2d 416, 418 (6th Cir. 1966), a Sixth circuit case not cited by the petitioners, the court recognized what explicit language is when it said, "Thus, we have remaining the principal issue, i.e., whether the employees in question were 'on the payroll.' Obviously, alternative terms could have been used in the collective bargaining agreement. The most obvious of which would have been *'on the active payroll'* or 'actually working on the 4th Friday in March'." (emphasis added). Swift's Master Agreement with Amalgamated contained the language recognized by the Sixth Circuit as "most obvious."Based upon this analysis, there is every reason to believe that if this case had arisen in the Sixth Circuit petitioners would not have received vacation pay. The petitioners' notion that vacation pay entitlement is the same under all contracts is contrary to the fundamental contract principle that it is the parties, not the courts, that strike the bargain.

IV

The Petitioners' Suggestion That a Special Standard of Review Should be Applied to Unfair Representation Cases is Without Merit

Petitioners argue that in unfair representation cases the district court acts as an arbitrator, and that since an arbitrator's decisions are virtually unreviewable the district court's decision should likewise be unreviewable. This ill-contrived argument, which first saw light in the petitioners' petition for rehearing in the court of appeals, is contrary to petitioners' position in the district court when they argued:

> Number one, the Court having found that there was unfair representation and having set aside the purported settlement agreement, the Court now sits as the trier of fact and law on the whole dispute. . . . The Court having found unfair representation, we are no longer concerned with what an arbitrator would do because we are in Court on it. (March 11, 1977 district court hearing, T.P. 53).

It is also contrary to their initial position in the court of appeals where they argued the Findings should be sustained unless they were clearly erroneous. Brief of Appellees and Cross-Appellants at 16.

It is not surprising that the petitioners do not cite a single judicial opinion, treatise, law review article or anything else that supports their notion. A district court judge is not an arbitrator and rules applicable to arbitration do not apply. The finality of an arbitrator's decision reflects that in arbitration the arbitrator's decision is what was bargained for and review of that decision would frustrate the basic purpose of arbitration which is to dispose of disputes quickly without the expense and delay of protracted court proceedings. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960);

Saxis Steamship Co. v. *Multifacs International Traders, Inc.*, 375 F.2d 577 (2nd Cir. 1967). These policies are inapplicable to appellate review of a district court's decision.

Contrary to the petitioners' contention, the court of appeals did not engage in de novo fact finding. There were no disputes at trial on the hard facts about what happened nor credibility problems about what witness to believe. In reaching its decision the appeals court did not have to re-evaluate the credibility of witnesses because the testimony was not conflicting. It did not have to re-evaluate disputes over what happened or what was said because there was no such disputes. After a careful review of the record it did determine that the factual conclusions reached by the district court were unsupported.

CONCLUSION

For the foregoing reasons the questions presented in the petition are not substantial. The writ of certiorari should be denied.

Respectfully submitted,

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BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

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The respondent Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereafter "Amalgamated") asks the Court to deny the petition for writ of certiorari which seeks a review of the Eighth Circuit's decision.

QUESTIONS PRESENTED.

The statement of the questions presented in the petition is in each instance framed so argumentatively, and so extensively subsumes facts not developed at trial or found by the Court below, that this Respondent believes that Petitioners' formula-

tion is inadequate. There is no evidence, for example, that any "settlement proceeds" were "appropriated", as Petitioner states; there is no evidence that a grievance claim for wages was traded for an equivalent amount of "gratuitous" pension benefits; and there is no pleading on file, and no evidence in the record to suggest, that the district court was acting as a substitute for an arbitrator. Respondent believes the questions presented by the petition would more appropriately be stated as follows:

1. Whether Amalgamated breached its duty of fair representation by settling and withdrawing the vacation pay grievance short of arbitration where it had concluded, upon consideration of the explicit contract language, bargaining history and the opinion of counsel, that a violation of the contract could not be established and, consequently, the arbitration could not be won.

2. Where the court of appeals concluded the denial of vacation pay was not a violation of the collective bargaining agreement and thus, necessarily, that the grievance which the Union failed to arbitrate had no merit, whether the Union should nevertheless be held to have violated its duty of fair representation by failing to pursue the grievance to arbitration.

STATEMENT OF THE CASE.

The plaintiffs sued to recover vacation pay under a collective bargaining agreement entered into between the Respondent Swift & Company (hereafter "Swift") and Amalgamated. Nowhere in the statement of the case at pages 3-11 of the petition is there any reference to the specific provisions of the vacation pay clause of the contract.

The crucial vacation pay provisions appear in the opinion of the court of appeals at pages A-13 to A-14 of the printed Appendix filed with the petition. That contract language provides that in order for an employee to have received vacation pay he had to fulfill *both* of two conditions: (1) he had to have been

on any payroll of the company (active or benefit) for 270 calendar days and (2) he had to have been on the *active* payroll on December 28 (Section 32). While the statement of facts in the opinion of the court of appeals is essentially correct, we believe a few additional facts ought to be emphasized.

Swift announced on May 29, 1967 that it would close its South St. Paul plant on November 29, 1969. The local union filed a catch-all grievance for "all vacations, pensions, holidays, S & A, and any and all other benefits and all monies lost due to the announcement of closing and the closing pursuant thereto." In support of the vacation claim, the local union asserted that all employees who worked in 1969 were entitled to 1970 vacation pay even though they could not be on the active payroll on December 28, 1969 because of the plant's closing in November.

The explicit contract language, as noted, denied vacations to any Swift employee not on the active payroll on December 28th. Over the years Amalgamated had repeatedly attempted without success, in successive periodic renegotiations of the agreement, to eliminate the qualifying date and to substitute a concept of pro-rata vacations. Written contract demands made by the union to eliminate the qualifying date were rejected by the company in bargaining. Only in 1973, in fact, four years after the plant closing in the case at bar, did the union finally succeed in negotiating a change in the agreement. The 1973 contract provided for pro-rata vacations in plant closing situations. VI App. 2919.[1]

Between 1949 and 1969 Swift closed more than 35 meat packing plants. In each instance Swift refused to pay vacations

1. The record in the court of appeals consisted of six volumes numbered I through VI. References to the Appendix filed with the petition will be preceded by the abbreviation "App." and then the page number.

to employees who were not on the active payroll on the qualifying date.[2]

The record shows that Amalgamated had been well aware, during all of the years of its collective bargaining relationship with the Company, of the problems caused by plant closings and had constantly pushed for improved closing-benefit provisions in the contract. Under provisions which consequently had become incorporated in the contract, employees who were terminated by Swift when its South St. Paul plant closed acquired the right to transfer to another plant; the opportunity to be placed on a company-wide waiting list for job openings at new plants; the right to a pension; the right to a very substantial separation allowance; the right to 26 weeks advance notice of plant closings; and the right to an eight week gratuity for employees retiring. VI App. 2772. The undisputed evidence showed that those provisions were totally and fully performed by Swift. See the court of appeals opinion at App. A-21.

Finally, it should be pointed out that no one involved in the decision to withdraw the vacation pay grievance and to conclude a settlement with Swift believed that the vacation pay grievance could be won in arbitration. Two very experienced attorneys who had handled hundreds of arbitrations in the meat packing

2. The sole exception occurred at Swift's plant in Sioux City, Iowa in 1968. The closing occurred on December 21, 1968—one week before the December 28, 1968 qualifying date. Employees had the right (as they also did in the closing in the case at bar) to transfer temporarily to other Swift plants. Due to the proximity of Sioux City to Omaha, employees threatened to transfer en masse for one week to the Company's Omaha plant, thereby remaining on the active payroll until the qualifying date to collect 1969 vacation pay. This would have produced economic chaos and disrupted operations at Omaha. Faced with the threat of mass transfers, the company agreed to pay vacations for employees who were on the active payroll as of December 21. The settlement agreement provided that it did not constitute a precedent. Sioux City employees, however, who quit prior to December 21 in anticipation of the closing and employees on the "benefit" payroll (as distinguished from the active payroll) on December 21 did not receive 1969 vacations for the reason they were not on the active payroll on December 21 as the settlement agreement required.

business testified that the grievance could not be won. IV App. 1727-1729; 1756-1761; 1904. A vice president and director of the Packinghouse Department of Amalgamated told the local union grievance committee that "we had a loser"; to an international vice president there was not a "Chinaman's chance of winning an arbitration in a case of that kind"; and, although the local union president felt Swift had a "moral obligation" to pay the vacations, he recognized that it was not an obligation under the contract. Just as importantly, even to one of the class representatives (Buchholtz) who filed this suit, the grievance was a mere "shot in the dark" and to the other class representative (Tauer) it was not "unreasonable or arbitrary on the part of the Defendant International Union" to conclude that under the contract "in all likelihood the arbitration of the prorated vacation pay issue would have been lost". IV App. 1601-1602.

REASONS FOR DENYING WRIT.

The Opinion of the Court Below Conflicts with No Decision of This Court.

The issue underlying the entire dispute is whether or not the employees at Swift's South St. Paul plant in 1969 were entitled to receive payment for vacations. The court of appeals concluded that they were not. There simply cannot be any serious contention that the language of the collective bargaining agreement in force at that time would permit any other decision. Despite repeated attempts over the years by Amalgamated to change it, the language was crystal clear. The employees *had to be* on the active payroll on December 28, 1969 in order to qualify. The agreement had been consistently so interpreted for 20 years. The plant was closed on November 29, 1969, and, with the exception of a small remaining force, all employees were terminated.

Relying on decisions awarding vacation pay in other instances, ignoring the particular language of the contracts in issue in those

cases, petitioners argue that this Court should now enunciate an immutable and universal eligibility rule for "vacations" outside the context of the particular language in a collective bargaining agreement. In short, they ask this Court to do what the district court did (and what the Court of Appeals refused to do) i.e., to excise the December 28 qualifying date from the contract and, after the excision, conclude that in all probability the vacation grievance would have been won in arbitration. Thus petitioners argue that the grievance did have merit, and the Union violated its duty of fair representation in declining to arbitrate.

It is clear that the opinion of the court of appeals is precisely in line with thirty-five years of precedent beginning with *Steele* v. *Louisville & N. R. Company,* 323 U. S. 192 (1944) through *Vaca* v. *Sipes,* 386 U. S. 171 (1967) and, most recently, *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554 (1976).

The petitioners go further and urge that this Court should hold the Union violated its duty even if the court of appeals correctly decided that the collective bargaining agreement did not entitle petitioners to vacation pay. They suggest that the Eighth Circuit's reliance on *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554 (1976) is misguided. In *Hines* this Court held that in order to prevail in an unfair representation suit employees "must show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. As the District Court indicated, this involves more than demonstrating mere errors in judgment." 424 U. S. 570-571. Thus, this Court has held, if there is no violation of the contract, *a fortiori* the union cannot be held for damages for failing to prosecute a meritless grievance. The court of appeals decision in the instant case is no way in conflict with *Hines* or any other decision of this Court. The petitioners have not cited, and cannot point to a single decision in which this Court has ever held that a union violated its duty of fair representation in failing to pursue an insupportable claim of contract violation.

The Eighth Circuit held, in the case at bar, "because there was no contractual obligation on the part of Swift to pay the vacation pay, that under the circumstances of this case and considering the duty of the union to fairly represent the older employees too, the union could not be held guilty of unfair representation," citing *Hines.* App. pp. A21-22. The court below thus recognized that unions must be given discretion to make judgments as to what grievances to file and how far they should be pursued. That discretion, under settled principles, may not be interfered with by the courts except where the union's decision in settling or withdrawing a grievance is motivated by bad faith, discrimination, arbitrariness or other invidious considerations. This Court made that doctrine clear even before *Vaca* v. *Sipes. Ford Motor Company* v. *Huffman,* 345 U. S. 330 (1953). Employees represented by unions do not have an absolute right to have the union process any and all grievances which the employee may choose to present and, conversely, the union has no duty to process each and every grievance.

With reference to the fact that the Union was able to persuade the Company to grant pension benefits to long-service employees in their fifties who were slated for termination in the final phase of the closing, but who were just short of meeting the age requirement for pensions, although the Union could not persuade the Company to pay the vacations claimed by petitioners, the Eighth Circuit in its amended opinion also recognized the dilemma so often faced by unions when they achieve benefits for one group while leaving another disgruntled. As the court said of the Union's accomplishment in this respect: "It made the best of a contract it had been trying to change for several years without success." Appendix, page A-23.

This Court has long recognized the difficulties faced by unions in such cases. "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Company* v. *Huffman,* 345 U. S. 330, 337-338 (1953). *See also Humphrey* v.

Moore, 375 U. S. 335, 349 (1964); *Simberlund* v. *Long Island Railroad Company*, 421 F. 2d 1219 (2nd Cir. 1970); *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (2nd Cir. 1959) and the Eighth Circuit's decision in *Corcoran* v. *Allied Supermarkets, Inc.*, 498 F. 2d 527, 530 (8th Cir. 1974).[3]

The opinion of the court below is not in conflict with any decision of this Court.

3. Petitioners repeatedly suggest the notion that their vacation claim represented a value of $1,053,000 which was "swapped" for what the Petitioners deem to be $920,000 worth of pension benefits achieved for other employees. This, of course, conveniently overlooks two facts: (1) in the light of the contract language, the bargaining history and the 20 years practice of the parties (and as ultimately affirmed by the Court of Appeals) the vacation claim was without merit under the contract, and represented little or nothing in value that could be "swapped"; and (2) the Company witnesses testified, without contradiction, that in their decision to grant the pension benefits, they took into account not the attribution of any value of the vacation claim but rather (a) the fact that the employees who were to receive the pensions would waive their rights to substantial amounts in severance pay and (b) that, in any event, the pension benefits would be paid out of a pension fund and not out of current Company profits. III App. 1223-25; IV App. 1658-59, 1702-09.

Thus, insofar as petitioners suggest that they, and not the prospective pensioners, should have received any benefits "swapped" in return for their vacation claim, the fact is that their vacation claim represented nothing of value for which the Company was ever willing to pay anything to them. On the other hand, even if it could be said that the Company, having indicated its willingness to make the new pension benefits available (because it felt that there was only a minimal cost to the Company), played "hard ball" in the bargaining process by also indicating that it would do so only if relieved of the nuisance of arbitrating a meritless grievance, it might well be asked whether the prospective recipients of the pension benefit might not have presented a contention of unfair representation if the Union had elected to deprive them of the pension benefit merely to satisfy the petitioner's insistence on arbitrating a grievance recognized to be without merit and not worthy of arbitration.

The Opinion of the Eighth Circuit Is Not in Conflict with Cases Decided by the Sixth Circuit.

The court below said it chose not to follow a line of authority which would pro-rate vacation benefits on the basis of a company's unilateral action in closing a plant. It cited the Sixth Circuit's decisions in *Schneider* v. *Electric Auto Lite Company*, 456 F. 2d 366, 372 and *Baldwin-Montrose Chemical Company* v. *International Union, United Rubber, Cork, Linoleum and Plastic Workers*, 383 F. 2d 796, 798 (1967). It said it did not agree with the reasoning of those cases and, moreover, in neither of those cases was there any discussion of bargaining history or past practices in related situations. The court said it was clear from the bargaining history between Swift and Amalgamated and the past practice between them, the facts relating to which were not seriously controverted, "that the union and its members *knew* or should have known that the contract did not provide for vacation benefits upon the closing of the plant, bargained to obtain them, and settled without the requested change." Appendix, page A-21.

On reasonable analysis it becomes apparent that the Eighth Circuit's decision in the case at bar is not in conflict with either of the cited Sixth Circuit decisions. *Schneider* was a class action arising out of the permanent shutdown of a plant in Toledo involving claims for lost wages, vacation pay, pension rights and insurance benefits under a collective bargaining agreement. The contract, however, contained provisions giving vacations to employees who were in the active employ of the company, or laid off or retired, or on leave of absence on December 31. That kind of provision does not appear in the Swift contract. Under the Swift contract, even persons who, at the time of the closing, were on layoff, or were retired, or were on leave of absence were not entitled to vacation pay. Thus there was no exception to the requirement that the employee be on the active payroll on the specified date in order to qualify for vacation. The contract in

Schneider obviously was different. "The contract language explicitly covers the situation in which an employee is laid off, retired, or on leave of absence, but there is no mention of a plant shutdown." 456 F. 2d at 371.

Similarly, in *Baldwin-Montrose* the vacation pay clause required that a person be "an employee" on the qualifying date and that he or she must have worked thirty pay periods during the preceeding twelve months. Again, there was no provision which required the employee in that contract to be on the "active payroll" as was the requirement in the Swift agreement.

Thus, all that can be said about these two Sixth Circuit decisions is that different contract provisions produce different results.

Petitioners also contend that the opinion of the Sixth Circuit in *Local 186, United Packinghouse Food and Allied Workers* v. *Armour and Company*, 446 F. 2d 610 (1971), *cert. denied*, 405 U. S. 955 (1972) "raised the same basic issue in the same industry and involved a local of the same union involved in this case" and concluded that vacation pay was due following a plant close-down. But, of course, there is no uniform "basic issue" common to these cases. The Sixth Circuit in *Local 186* had before it a different contract. There was *no provision* in that contract requiring an employee to be on the active payroll.

Moreover, it is significant to note, with respect to the issue of whether Amalgamated made a rational judgment as to the probabilities of winning or losing the vacation pay grievance in arbitration, that, at the time of the settlement between Swift and Amalgamated, the district court in *Local 186* had held that the employees were *not* entitled to vacation pay. The Sixth Circuit decision in that case was rendered after the settlement had been made. The district court opinion is reported by the CCH Labor Service, 66 LC Para. 12,074.

CONCLUSION.

The court of appeals correctly concluded that the language of the collective bargaining agreement between the Respondents Swift and Amalgamated in force in 1969 precluded vacation pay when the plant closed on November 29, 1969. That conclusion is compelled by the unambiguous language of the instrument itself, the bargaining history and the practices which had been followed for 20 years between the parties. There has been no failure by the Eighth Circuit to follow decisions of this Court. There is no conflict with any decision of any other circuit because no other circuit has considered a collective bargaining agreement with the "active payroll" language in it.

For the foregoing reasons the Respondent Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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